

Exhibit 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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BMG RIGHTS MANAGEMENT (US) LLC, :
et al., :
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Plaintiffs, :
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vs. : Case No. 1:14-cv-1611
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COX ENTERPRISES, INC., et al., :
Defendants. :
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VOLUME 1 (p.m. portion)

TRIAL TRANSCRIPT

December 2, 2015

Before: Liam O'Grady, USDC Judge

And a Jury

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1 NOTE: The afternoon portion of the case on
2 December 2, 2015 begins in the absence of the jury as follows:
3 JURY OUT

4 THE COURT: All right. Are we ready for our jury?
5 All right. Joe, let's get our jury.

6 NOTE: At this point the jury returns to the
7 courtroom; whereupon the case continues as follows:

8 JURY IN

9 THE COURT: All right. Please be seated.
10 As I said, we will have opening statements at this
11 time.

12 Mr. Warin, whenever you are ready, sir.

13 MR. WARIN: If I please the Court. Thank you, Your
14 Honor.

15 Good afternoon. I was introduced this morning, but
16 let me introduce myself again. My name is Roger Warin. And
17 along with my colleagues, I represent BMG Rights Management.

18 This is my chance to tell you about BMG's case and to
19 give you a preview of what we think the evidence will show.
20 And from our perspective, the evidence is largely undisputed
21 and comes substantially from Cox's own files, its internal
22 documents, and the admissions of its own employees.

23 The evidence will show that Cox Communications, Inc.
24 and CoxCom, LLC are liable to BMG because of Cox's decision to
25 block, delete, and ignore millions of notices from BMG of

1 illegal copyright infringement taking place on its high-speed
2 Internet network and for its decision to permit and to profit
3 from its subscriber's rampant use of the Internet to steal
4 BMG's copyrighted music through the online file sharing
5 protocol known as BitTorrent.

6 One in ten of Cox's customers admit that the
7 opportunity to get music for free via BitTorrent is one reason
8 they subscribe to Cox. Because it didn't want to lose the
9 revenue, even though it knew of widespread illegal infringement
10 taking place on its network, Cox turned a blind eye and enabled
11 its subscribers to repeated use of the BitTorrent protocol to
12 infringe and steal BMG's copyrighted songs.

13 Complying precisely, precisely with Cox's own
14 published detailed requirements on how someone who thought
15 their music was being infringed should notify Cox, BMG sent
16 numerous infringement notices to Cox with respect to illegal
17 copying of its songs. BMG's notices provided detailed
18 information on the infringement taking place on the Cox
19 network.

20 But Cox did nothing with those BMG notices, those
21 infringement notices. Instead, Cox deleted millions of the BMG
22 notices and knowingly continued to allow its subscribers to
23 illegally copy BMG songs over its network. And most
24 surprisingly, it kept absolutely no record, no record at all of
25 the BMG notices. It just threw them out.

1 There is no question that Cox had the power to act on
2 the BMG notices. Cox could have forwarded them to their
3 subscribers that were engaged in the illegal copyright
4 infringement. It could have sent its own notices to its
5 subscribers with respect to the conduct that was going on on
6 their network. And it could have either suspended or
7 terminated those customers because they were engaged in illegal
8 conduct on the Cox network.

9 But instead of doing any of those things, Cox simply
10 threw away the BMG notices, kept no record of them and, as the
11 evidence will show, went to great lengths to keep its
12 subscribers who were repeatedly infringing and taking BMG's
13 copyrighted songs.

14 Why did they do it? So they would continue to get
15 the revenue, the subscription money from those subscribers who
16 were engaged in illegal conduct. That makes Cox both
17 contributorily and vicariously liable for the conduct of its
18 subscribers on its network, and willfully so.

19 Let me introduce the parties. You had just a brief
20 introduction to them so far, but let me give you a little more
21 details. Who is BMG Rights Management? Well, BMG Rights
22 Management is a music publisher for songwriters.

23 You will hear -- it's the next witness -- from
24 Laurent Hubert, who is the president of BMG, and later you will
25 hear from Keith Hauprich, BMG's deputy general counsel, and

1 they will tell you about BMG's business and how it operates.

2 BMG represents 15,000 songwriters, the people who
3 write the music and the lyrics. The composers. Not the
4 performers, but the people who dream up the words and the music
5 that goes with them. BMG controls copyrights to over 2 million
6 works. BMG also holds the copyrights on the 1,397 music
7 compositions at issue in this case.

8 Now, let me take a moment and tell you a little bit
9 about what a copyright is. I think most of you probably know,
10 but in case you need a refresher, let me just run through that.

11 As provided by federal law, a copyright is a
12 protection provided by law to an owner of a copyright allowing
13 that individual or entity the exclusive right to reproduce,
14 distribute, perform, and display the copyrighted works.

15 There is no issue in this case as to whether BMG has
16 the legal authority to the exclusive rights to the 1,397 songs
17 at issue.

18 The goal of both copyright law and BMG's goal is the
19 same, to make sure that songwriters are able to make a living
20 from the sale and distribution of their songs. Like all of us,
21 they are entitled to be paid for their work. Their work is
22 writing words and music to their songs.

23 Who gets the money? BMG acts as their agent, and
24 \$0.70 to \$0.90 out of every dollar BMG collects goes to the
25 songwriters.

1 Songwriters earn money in a variety of ways. They
2 earn money on the distribution of their songs. They are paid
3 royalties, and those royalties are paid from sales of CDs. I
4 am an old guy, so I still have CDs and listen to them in the
5 car. Sales to people who stream. Sales to people who legally
6 download from iTunes. They get paid money from Pandora when
7 Pandora is playing a song that they wrote. They get paid a
8 royalty when their song is played on the radio or used in a
9 movie. That's how they get paid.

10 But songwriters earn no money, no money when their
11 songs are stolen and made and shared for free over the
12 Internet, over the Cox network, using BitTorrent.

13 When a song is shared illegally over the Cox network
14 using BitTorrent, the songwriter loses control over his work.
15 That song very quickly is now in the hands of dozens, hundreds,
16 or thousands of people who paid nothing for it.

17 Let me give you a big description of Cox. Cox is the
18 fourth largest cable broadband company in the United States.
19 Its projected 2015 revenue from high-speed Internet is
20 approximately \$3 billion. That's not their overall revenue,
21 that's their revenue from high-speed Internet.

22 In 2014 Cox had 4.5 million subscribers. Cox, like
23 many Internet service providers, ISPs, provides bundled
24 services. You may have heard some of it when the judge was
25 asking the jury questions this morning. So they provide

1 telephone, they provide Internet, and they provide TV. What we
2 are here about today is the Internet service.

3 The relationship between Cox Communications, Inc.,
4 and CoxCom, LLC. Cox Communication, Inc. is the parent. And
5 CoxCom, LLC is the subsidiary. CoxCom employs the group of
6 individuals that are responsible. They have a group within Cox
7 Communications that are responsible for preventing copyright
8 infringement and other abuses of Cox's Internet network.

9 Most of the evidence you are going to hear from us
10 are going to be e-mails and testimony that those people whose
11 job it was to root out Internet copyright infringement, the
12 exact opposite was happening. They were aware of it and
13 allowed it to continue to happen and continued to reinstate
14 their customers who they knew were engaged in this kind of
15 illegal activity.

16 CoxCom is the subsidiary that actually provides the
17 Internet services and promulgates something called the Cox
18 Acceptable Use Policy, and I am going to show you portions of
19 that in just a minute. That is part of the agreement that
20 every single Cox subscriber, the contract that every single Cox
21 subscriber signs when they sign up to be a Cox subscriber.

22 Let's talk a little about what we think the evidence
23 will show. We believe the evidence will show that Cox is
24 legally responsible for the infringement of BMG's copyrights.
25 The law makes Cox liable for copyright infringement by its

1 subscribers of its Internet service when the following is true:
2 Number one, it knew or had constructive knowledge about the
3 infringement taking place on its network.

4 Number two, it profited from that infringement.

5 Number three, it had the right and the ability to
6 stop that infringing illegal activity on its network.

7 And number four, did virtually nothing to stop it.

8 The evidence will show infringement on the Cox
9 network of BMG's copyright works on a massive scale. The
10 uploading and downloading literally millions of times on Cox's
11 network.

12 There is no serious dispute that there was widespread
13 rampant illegal copying of BMG's songs on the Cox network. One
14 of the witnesses you will hear from is a man named Robert
15 Bardwell, one of BMG's experts. And he will explain both the
16 scope and the intensity of the infringement on the Cox network.

17 Under law, once it has been established that
18 infringement of BMG's songs have taken place on the Cox
19 network, even if Cox itself wasn't the one doing it, under the
20 law Cox will be liable for damages if BMG can show that Cox was
21 either contributorily -- guilty of contributory infringement or
22 is liable for vicarious infringement. And I am going to walk
23 through those to explain why it is that under the law Cox is
24 liable for the activities, the repeat activities of its
25 subscribers.

1 The evidence we believe will clearly establish that
2 Cox is liable for both, both contributory infringement and
3 vicarious infringement. Let's talk first about contributory
4 infringement. We believe the evidence will show that Cox was
5 aware of widespread copyright infringement on its network
6 because it was receiving infringement notices not just from
7 BMG, but from hundreds of copyright owners complaining about
8 the infringement of their copyrights on the Cox network.

9 But apart from Cox's general knowledge of massive
10 copyright infringement on its network, Cox had actual or
11 constructive knowledge of the fact that its subscribers
12 illegally copied BMG's songs without paying for them.

13 BMG sent millions of notices, and Cox threw away
14 every one of them, like ripping up the mail when it comes
15 without looking at it.

16 Why did -- you may ask the question, well, why did
17 BMG send so many notices? That sounds like a lot of notices.
18 They sent so many notices because of the rampant, widespread,
19 pervasive copyright infringement on the Cox network. Every one
20 of those notices, ever single one of them, identified a
21 specific date and time when the infringement took place, the
22 address of the Cox subscriber, and the BMG song that was
23 copied. That's what's in the notices, and I'll show you those
24 in a minute.

25 If Cox had sent its subscribers the notices telling

1 them that their infringing active had been observed and they
2 were engaged in illegal copying, telling them that it was
3 illegal and contrary to Cox's own Acceptable Use Policy, or if
4 Cox had sent on the notices that we were sending them, they
5 would have had far fewer notices to send on because Cox would
6 have then been assisting BMG in addressing the copyright
7 epidemic on its network. But Cox did none of those things.
8 And instead it continued to facilitate and ignore the ongoing
9 infringement on its network.

10 Now, Cox has criticized BMG and Rightscorp for
11 sending too many notices. I suspect during the course of this
12 trial you're going to hear that from Cox. Oh, there were just
13 so many. And Cox's proposed solution is simple, BMG should
14 just have sent fewer notices and just ignored all of the other
15 infringements of BMG's songs that were taking place in the
16 network.

17 So if I have four children, they're all copyright
18 artists, and Cox says we can't send notices from all four, you
19 can only send it from one, am I just supposed to tell my other
20 three kid that have that copyright entitlement, oh, we're not
21 going to bother with yours?

22 That was Cox's approach. You're sending too many
23 notices, you can't send that many.

24 Well, we sent that many because we represent
25 songwriters whose songs were being infringed on the network.

1 And we didn't have an obligation to favor some over the others,
2 we had an obligation to protect the rights of all of them, to
3 advise Cox that we were aware of the infringement on their
4 network for all of the 1,397 songs that we were protecting.

5 The evidence is undisputed that Cox deliberately
6 chose, though, to ignore the detailed notices of specific
7 infringement. And as a result, Cox chose to be willfully
8 blind, willfully blind to the illegal copyright infringement
9 taking place on its network. It also chose to be willfully
10 blind to its subscribers using its network to steal BMG songs
11 without paying for them.

12 The evidence will also show that Cox provided
13 material contribution to the infringement. It facilitated the
14 infringement. Without Cox, the infringement could not take
15 place on its network. By actively running interference for the
16 infringing subscribers, Cox aided and abetted the continuing of
17 their illegal activities. Cox's network and facilities --
18 network and facilities provided the access and the site and
19 facilities where the infringement took place.

20 By flaunting its own rules and reactivating known
21 infringers, Cox also provided material infringement -- material
22 contribution to that infringement.

23 And worse -- and you're going to hear about this and
24 I'm going to show some e-mails, internal Cox e-mails -- in a
25 deliberate effort to try to avoid legal liability, Cox

1 pretended to terminate those real infringers when it really
2 didn't. And you're not only going to see the e-mails, but
3 you're actually going to see video of some Cox witnesses when
4 they were asked about that under oath.

5 The evidence is also going to show that Cox is liable
6 not just for contributory infringement, but for vicarious
7 infringement. As we go forward, I want you to understand that
8 BMG doesn't have to prove that Cox is guilty of both. Cox is
9 liable if we prove either one or the other. But we believe
10 that the evidence will show that Cox is guilty of both
11 contributory infringement and of vicarious infringement.

12 Let me talk about vicarious infringement. And it's
13 importance when you consider vicarious infringement to realize
14 that we don't have to prove for vicarious infringement
15 liability that Cox either knew about the activity going on on
16 its network or that it intended. There's a different set of
17 standards for vicarious liability.

18 The first standard is that Cox had the right and
19 ability to control the infringing activity. Well, there's no
20 question about that. Cox is the gatekeeper. Cox's contract
21 with its subscribers contained the Acceptable Use Policy. That
22 Acceptable Use Policy that every one of Cox's subscribers signed
23 on to prohibits copyright infringement. Cox admits that it had
24 the right and ability to suspend and to terminate its
25 subscribers who engaged in copyright infringement on its

1 network.

2 It stands to reason. You know, Cox doesn't have to
3 sit by and let its network be used for illegal activity. And
4 that's what the agreement said with each of their subscribers.

5 Cox knew that the copyright infringement was going on
6 its network and it was pervasive. And it ignored its own
7 stated policy. Rather than terminate repeat infringers, Cox
8 did everything to keep repeat infringers as subscribers, even
9 going so far -- even going so far as to create termination
10 records for -- fake termination records for repeat infringers
11 and then reinstating them immediately.

12 Click a button, oh, you're terminated. Click another
13 button, you're reinstated. And then they would create a record
14 that says that they terminated that repeat infringer.

15 Why didn't Cox just go to the trouble of terminating
16 repeat infringers when it got all of these notices, not just
17 from BMG, but from others. Well, the evidence -- the evidence
18 is Cox's own documents, will show that Cox didn't stop habitual
19 repeat offenders because it didn't want to lose the revenue.

20 BMG's expert witness, Dr. Stephen Nowlis, will
21 testify that based on his survey of Cox subscribers,
22 approximately 10 percent of Cox subscribers admit that they
23 described to Cox in order to engage in this activity, to steal
24 music.

25 Mr. Hubert, who you will hear as the first witness

1 this afternoon, will tell you that BMG is suing Cox because Cox
2 is the gatekeeper of the Internet for its subscribers. He will
3 explain that it is virtually impossible to address wide scale,
4 pervasive infringement on the Cox network in a meaningful way
5 by suing the individual subscribers. First, BMG doesn't know
6 the identities of the individual subscribers, only Cox knows
7 it. So in order to bring a suit against the individual
8 subscribers, they would have to bring some suit to try to get
9 the identity of them, which Cox wouldn't give them without
10 bringing a suit.

11 If they had to sue the individual subscribers, how
12 many would that be? Thousands, tens of thousands of suits
13 throughout the entire Cox network? The subscribers often have
14 limited resources to pay lawyers and to pay damages for the
15 infringement.

16 And finally, unlike Cox, unlike Cox, I'm confident
17 that some of the subscribers that were engaging in this
18 activity didn't know it was illegal. But Cox did.

19 So it's not a solution to say, go out and bring tens
20 of thousands or hundreds of thousands of lawsuits against these
21 people that are infringing. That's a teaspoon solution to an
22 ocean problem. Suing Cox is BMG and its songwriter clients'
23 best hope to stem the rampant stealing of their work on the Cox
24 network.

25 Now, let me talk to you a little bit about how it

1 happens and how it works. And believe me, as a history major,
2 I'm not going to get into any great detail about BitTorrent,
3 but I'm going to give you kind of a broad overview as I
4 understand it.

5 Number 1, it's clear that there has been a massive
6 amount of infringement on the Cox network using BitTorrent.
7 And Cox knows that BitTorrent is used to extensively by its
8 customers. So Cox knows that one of the things its customers
9 are doing is using BitTorrent.

10 Cox also knows that BitTorrent is widely used by its
11 customers for peer-to-peer illegal downloading and uploading of
12 copyrighted songs and movies. The evidence will show that
13 virtually every musical composition being shared on BitTorrent
14 is infringing. It's not a legal copy, and the way it's
15 distributed is not legal. It's illegal copyright infringement.

16 Let's talk about what Cox knew and what it didn't
17 know. And you're going to hear about an individual named
18 Jason Zabek. Jason Zabek -- here is his picture here. You'll
19 hear his deposition later. He was the guy that was largely in
20 charge of the Cox Abuse network. It was part of Cox that is
21 supposed to be monitoring and rooting out the improper use of
22 its network. And I'm talking about BitTorrent.

23 Well, Jason Zabek knew exactly what BitTorrent was
24 and here's his e-mail. "BitTorrent is used for only one thing,
25 and I would know," smiley face.

1 Let's go on, how did they know? Well, Cox not
2 surprisingly keeps track of what its subscribers are doing.
3 They keep track of how they're using their Internet resources.
4 And this is a page from one of the summaries Cox keeps track
5 of. So they have the data to determine what their subscribers
6 are doing on their network.

7 And if you look at the part that I have highlighted
8 in yellow, P2P, that is peer-to-peer. That means the copying
9 is not going on like in the old days of Napster where everybody
10 goes to Napster and tries get it there. The copying is going
11 back and forth between various subscribers. And I'll show you
12 how that works in just a minute on BitTorrent.

13 Now, look at the number next to that? An average Cox
14 subscriber is spending 21 hours a month using the BitTorrent
15 protocol. And they know that the BitTorrent protocol is used
16 primarily for illegal copyright infringement. This is their
17 own record, they know that.

18 Let's go a little further. Let's talk a little bit
19 about how BitTorrent works. Please excuse the graphic, but
20 maybe it will help you explain it. We've got a whole bunch of
21 individuals that are on their individual either desktop or
22 laptop. And the way that BitTorrent works is I go load that
23 protocol on my computer, and other people do the same thing,
24 and then I have some of my songs, and so I put my songs in
25 there, I go to a site -- and I'll show you the site in a

1 minute. PirateBay is one of them. And PirateBay keeps track
2 of what everybody has got.

3 And so, once we're all there, my songs start going
4 out and coming back. And the same thing happens with all these
5 other people. It doesn't go to one central location and stay
6 there. It's simultaneously slicing and dicing that song, like
7 a piece of pie sliced into 100 or 200 different slices, and
8 then reconfigured back when somebody wants a copy of it.
9 That's how BitTorrent works, that's how it avoids or tries to
10 avoid the Napster problem.

11 Now, I mentioned PirateBay. PirateBay is a one of a
12 number of these sites where -- that using BitTorrent they
13 facilitate the illegal peer-to-peer copying of copyrighted
14 music without anybody paying for it. I find it interesting
15 that they would use the symbol pirate with the skull and
16 crossbones, and I would like to point out to you that the two
17 people that founded it were criminally convicted four or five
18 years ago outside the United States.

19 Let's go a little further to show how this would
20 work. So I've got ThePirateBay, which I access on the
21 Internet. I've already got the BitTorrent program on my
22 individual computer. So what's happening is everybody who is
23 hooked in in this maze -- and you're going to hear about
24 swarms, and you're going to hear about peers, and you're going
25 to hear about torrents.

1 The simple version is, is that everybody who chooses
2 to participate in there is sharing everything simultaneously.
3 And it's like a virus, it just keeps spreading and spreading
4 and spreading because while it's going out, it's coming back
5 in. While it's a source, it is also a recipient.

6 And you're going to hear one of our witnesses,
7 probably tomorrow, Barbara Frederiksen-Cross, will give you a
8 more detailed, a more technical explanation of it. But for the
9 purposes of an overview, I think that that will help you
10 understand a little bit how this infringement takes place.

11 Now, ISPs. BMG knew that their songs were being
12 illegally copied. They had to try to find a commercial
13 solution to that. Are we just going to sit back and ignore the
14 fact that this is taking place through BitTorrent and through
15 ThePirateBay and Kickass Torrents and some of these other
16 sites, or are we going to try to protect the rights of our
17 songwriters and try to put an end to it?

18 So they reached a contract with Rightscorp. Now,
19 when you hear Cox's presentation, you'll think this whole case
20 is about Rightscorp, but actually it's about BMG retaining
21 Rightscorp to help them solve a problem. And here's how
22 Rightscorp did it. Rightscorp was able through some software
23 that it had developed to identify the infringement that was
24 taking place. And I'll show you an example of that.

25 This is a diagram that shows. So the first step is a

1 Cox subscriber installs BitTorrent on its own computer.
2 Rightscorp then sends out these notices. It asks the
3 subscriber for a file. And you'll explain later what the file
4 is and how it's a BMG and how it came from certain of these
5 other sites. And then the computer sends back, hey, I got that
6 file. But we didn't have it legally.

7 Rightscorp then captures the IP port, the file name,
8 the peer-to-peer software client, and generates a notice. And
9 these are the notices you're going to hear about that they send
10 to the ISP, to Cox.

11 And then Cox can be the one who can look up, who is
12 that? That particular IP address, whose e-mail account is
13 that? Because Rightscorp doesn't know that. BMG doesn't know
14 that. Only Cox knows it. And Rightscorp has the ability then
15 to send the notices to Cox and asks Cox to go ahead and send it
16 on to your subscriber saying, hey, we observed what you're
17 doing, it's illegal, you need to stop it, and we want to reach
18 a settlement with you.

19 And that's what Cox was supposed to do. But Cox
20 didn't do that. Because Cox blocked -- it set up a protocol on
21 the Web site, coxabuse.com, which is supposed to receive all
22 these complaints, so it was like a brick wall. When the
23 Rightscorp notices came in, they bounced back. Cox didn't open
24 them, didn't look at them, didn't pay any attention to them,
25 threw them away, didn't keep any record of it. This was the

1 way it was supposed to work, but this wasn't the way it worked
2 with Cox.

3 Now, let's talk about how the Rightscorp technology
4 works, and you're going to hear more about this from both the
5 Rightscorp witnesses, from Mr. Hubert, and also from
6 Ms. Frederiksen-Cross.

7 If you noticed down at the bottom it says SHA-1
8 hashtag, designed by United States National Security Agency.
9 NSA has created hashtags, and they use this kind of technology
10 to trace a lot of other stuff, but a unique fingerprint is on
11 each torrent. So when there is this illegal copying going on,
12 it leaves a trail. And that trail is the one that Rightscorp
13 was able to follow and get the information that it did about
14 the infringement that was taking place on Cox's network.

15 And the principal reason it was able to follow that
16 trail is this unique hashtag. Look at that number -- I didn't
17 even bother to count them. It looks like it is about 40
18 numbers and letters down at the bottom, that's the hashtag I'm
19 talking about. So that's the way the Rightscorp technology
20 worked.

21 And the idea between BMG and Rightscorp was, look, we
22 could go out and try to find out who these people were, we
23 could sue Cox to try to get their identity, and then we could
24 seal all the individuals and the subscribers, or we could
25 basically send Cox a notice, these are the people that are

1 infringing, these are the songs they're taking, here's when
2 they did it. We want you to send our notice to them telling
3 them what they're doing is wrong and asking if they'll pay a
4 settlement amount to us and we'll give them a release. A much
5 cleaner, easier resolution than bringing thousands of lawsuits
6 throughout the United States.

7 Now, let's look -- because I mentioned this
8 earlier -- at the Acceptable Use Policy. This goes to our
9 proving that Cox knew that what their subscribers were doing
10 was illegal. Read what Cox wrote under the caption
11 Infringement. "Pursuant to the Digital Millennium Copyright
12 Act, you may file a notification of the claimed infringement
13 with the designated agent on the service provider if you
14 believe that a Web page hosted by the service provider is
15 violating your rights under the U.S. Copyright Law."

16 So they're telling the people like the songwriters,
17 like BMG, if you think your songs have been infringed, you can
18 send a notice to us and the designated e-mail address is
19 abuse@cox.net. That's exactly -- that's exactly what BMG and
20 Rightscorp did.

21 Cox also had requirements, oh, you just can't send
22 whatever kind of notice you want. They had a very detailed
23 list of what has to be in that notice. Signed under pain of
24 perjury and all this stuff. BMG and Rightscorp complied
25 completely. Every one of the million notices that they sent

1 complied with Cox's own policy as to what they were supposed to
2 do if they had evidence that subscribers were infringing their
3 copyrighted works on the Cox network.

4 Now, this is an example of a Rightscorp notice parsed
5 down. So this is the notice that after they found out about
6 the infringement, after they've identified it, that they send
7 to Cox. And this then is a sample of a notice that they sent.
8 And it is true they sent more than a million of them.

9 And let's look what it says. Number 1, it says the
10 copyright owner, BMG Rights.

11 It says the ISP address -- excuse me, the Internet
12 service provider, Cox. So it says who owns the copyright and
13 whose network it was on.

14 It says the date and time of the infringement. When
15 did it take place? When was the illegal copying taking place?

16 It gives the IP address. Cox only really -- is the
17 only one who knows who are the subscribers associated with that
18 IP address. But when Rightscorp gives them that address, Cox
19 can go look at it, who is that, who's got that box.

20 It also gives them the port number.

21 It gives them the song infringed. It identifies the
22 actual song that was illegally copyrighted.

23 It gives the hash value. This is the unique
24 fingerprint that I told you about a minute ago.

25 So this is the detailed notice from Rightscorp and

1 BMG to Cox to allow Cox to know this is exactly who did it,
2 this is exactly when they did it, this is exactly what they
3 did. They copied this particular song.

4 Now, in addition to sending all of these notices,
5 rather than just focusing on sending a whole bunch of notices,
6 Rightscorp said, look, let's pick the really bad apples. Let's
7 let Cox know about those people on its network that are doing
8 this virtually all the time. The repeat infringers that are
9 copying song after song after song, and they're probably
10 copying movies and other things as well.

11 So this is an example -- let's see, this is what --
12 I'll get to this in a minute. But we also sent a summary on a
13 fairly regular basis. These people have more than 250 notices.
14 These people have more than 150 notices. That same kind of
15 detailed information.

16 So if Cox wanted to address not all the copyright
17 infringement, but the really bad apples, Rightscorp gave them
18 the list of the really bad apples. They could see how much
19 activity had gone on. They could see who was doing it and they
20 could take action if they chose to, if they chose to, but they
21 chose not to.

22 Now, that's -- the first thing is the actual notice.
23 The second one is the summaries. The third is the Dashboard,
24 and that's what you see on the screen now.

25 Rightscorp said, we're going to make you be able to

1 look at what we've got, our data, a Dashboard that comes in
2 that you can click on and get all the information you want. So
3 if you look at this particular data, you can go with your mouse
4 and click on that particular IP address, the port. The number
5 of infringements, that first one, 54,489.

6 So Cox can go on the Dashboard and look at that
7 number and just go down, it's the most egregious offenders,
8 click on them. They can get the information with respect to
9 every single one of those infringements. Every single one of
10 the songs infringed, the date it took place, the time it took
11 place, and in some instances they can even play the song that
12 was illegally infringed.

13 Did Cox pay any attention to the regular summaries we
14 sent? No. Cox's witnesses said, we paid no attention to them.
15 We not only canned the notices, threw them in the trash can,
16 didn't open them. We didn't pay any notice -- attention to the
17 summaries. And we never -- not one individual in Cox ever
18 accessed the Dashboard. We weren't the least bit curious to go
19 in and find out who are the really bad apples on our system.
20 Who are the ones that are causing all these notices to come in
21 of infringement? Not once did they think it was worth their
22 time and effort to go look at the Dashboard.

23 Now, I mentioned to you that Digital Rights
24 Corporation, which is Rightscorp, got blacklisted. Their
25 notices got bounced. And here's an e-mail from people that are

1 in that Abuse Cox network. They're the ones that are supposed
2 to be enforcing the -- rooting out copyright on their network.
3 Here's what they said. This was in February 2014. "Sources
4 like Digital Rights Corporation are blacklisted with us, so we
5 silently delete e-mail messages without any parsing, ticketing,
6 et cetera. As soon as our POP3 client recognizes the From
7 address in the headers as blacklisted, we delete the message
8 without retrieving the body of the message."

9 So you don't have to take my word that that's what
10 Cox was doing. Cox's own e-mails say that that's what they
11 were doing. They never bothered to open them up. They never
12 bothered to see who it was that was supposedly infringing, when
13 the infringement took place, or what songs were being
14 infringed.

15 Let's keep walking down this line because I think it
16 will be helpful.

17 In addition to not paying attention to our notices,
18 you're going to hear some suggestions from Cox that, well, the
19 reason that we didn't pay attention to the notices is because
20 they had settlement language in them. And it's true, I just
21 mentioned to you, the Rightscorp notices did have settlement
22 language in them.

23 And Cox will say that if we had removed the
24 settlement language, we would have "accepted them." But one of
25 the things I'm going to talk about in a minute is what

1 "accepted them" means, because it didn't mean that they were
2 going to notify the infringer. It means that they are going to
3 put them in the process. But we'll walk through that in a
4 minute.

5 But you've got to realize that the Rightscorp notice
6 does ask for a settlement amount. In the beginning, it was
7 \$10, then it got up to \$20. And it does say that if you don't
8 settle, you could be liable for up to \$150,000. Well, that's
9 because the statute -- the Copyright Act says that statutory
10 damages of up to \$150,000 are available for people who
11 willfully infringe copyrights.

12 So although Cox criticizes Rightscorp and BMG for
13 including that language in their notices, all they're doing is
14 quoting federal law, which says that people that are repeat
15 infringers -- willful repeat infringers could be subject to
16 liability of that sort.

17 And so, rather than being a threat, which is the way
18 Cox tries to portray it, it's simply reciting what that
19 individual's potential liability would be if we did what Cox
20 says we should have done, which is go sue the individual
21 subscriber.

22 But Rightscorp and BMG didn't want to sue the
23 subscriber. They wanted to handle it this way with an e-mail
24 notice that allowed the subscriber to see that they'd caught
25 them. It's an effect like the traffic camera. Here's the

1 snapshot of when you were infringing on BMG's copyright. We'd
2 like to settle with you, ten bucks, 20 bucks, 30 bucks, click
3 clear and we'll give you a release so you are done with your
4 liability with respect to that particular infringement.

5 And yet that's being criticized, too many notices and
6 threatening litigation. Well, the fact of the matter is -- and
7 if Rightscorp had ever -- BMG had ever sued anybody, you'd hear
8 about it, but the only people they sued was Cox because they
9 didn't think it was both appropriate and a reasonable business
10 response to go out and sue 10, 20, 30,000 individual
11 subscribers.

12 Here is another one of the e-mails from the Cox
13 people internally. You heard me say it, and now I'll show it
14 to you, that one of the things that Cox engaged in was fake
15 terminations, reactivation. And you're going to see a lot of
16 e-mails, and I'm not going to be able to go through all of them
17 with you right you, but I'm going to show you a few of them
18 that demonstrates how Cox was responding when they got notices
19 of repeat infringers.

20 Now, one of the things that I should point out is
21 that we weren't the only ones that were sending notices of
22 infringement. So some of the data with respect to the notices
23 and how they were handled were from other people that Cox
24 decided they were going "accept" because they didn't have the
25 settlement language in it. And they said to Rightscorp and

1 BMG, if you'd only taken the settlement language out, we would
2 have accepted them.

3 We can see what "accepted" means because they largely
4 ignore all those violations. They can correct hurdle and
5 hurdle after obstacle after obstacle before they will even
6 process them. And in the end, the repeat infringer clicks a
7 button and is "terminated" and then reactivated.

8 Let's look at some of the slides here. This is one
9 that they say, we want to hold on to every subscriber we can.
10 That's the reason they didn't terminate them even though they
11 knew they were engaged in this activity.

12 It goes on further. "If a customer is terminated for
13 DMCA" -- that will be shorthand for these purposes for
14 copyright infringement -- "You are able to reactivate them
15 after you give them a stern warning about violating the AUP and
16 the DMCA. After you reactivate the DMCA, counter restarts.
17 The procedure restarts with sending warning notices just like
18 the first offense."

19 You're going to hear that what happens is Cox imposed
20 all sorts of hurdles, even for those notices that they
21 "accepted." We're only going to take so many a day. We're
22 only going to take so many from a particular complainant.
23 We're only going to take so many about a particular infringer.
24 We're not going to have the first one count.

25 Only after you get through hurdle after hurdle after

1 hurdle do you go through their graduated response method.
2 Graduated response method is, well, the first one doesn't
3 count, and then probably the next three or four or five don't
4 count. Or if they do, you can say, click here, and you're
5 reactivated. And once you get to 12, 13, or 14, maybe we'll
6 have a telephone call with you, and those people are
7 reactivated.

8 So after you get through all of these hurdles, where
9 very few drop down to the bottom, they still have to go through
10 more hurdles with infringement notice after infringement notice
11 after infringement notice where they finally say, well, we're
12 going to terminate you, and then it turns out that they
13 immediately reactivate them.

14 These are people who in many instances admitted when
15 a Cox representative talked to them that they were engaging in
16 illegal copyright infringement over their network.

17 And this procedure I just described, look at the last
18 line. "This only pertains to DMCA violations." So other
19 violations of network policy, spam abuse, excess bandwidth,
20 they don't go through this fake termination/reactivate process.
21 It's only when somebody else's property is being stolen. It's
22 only when copyright infringement is taking place that they go
23 through this obstacle after obstacle and then charade at the
24 end about terminate and reactivate.

25 Now, this is the policy. "Violation of the AUP may

1 result in immediate suspension or termination of either your
2 access to the service or" -- and this says that you the
3 subscriber, "You may not use the service to copy, post,
4 transmit, or disseminate any content that infringes the
5 patents, copyrights, trade secrets, trademark, moral rights, or
6 proprietary rights of any party."

7 When I sign up for Cox, that's the rules, and I am
8 told that violation of this term could result in my
9 termination. So one of the elements we have to prove is that
10 Cox had the ability, the right, the power to terminate the
11 activity on the network. The Cox policy that they signed with
12 their subscribers makes it clear as day that they had that
13 procedure, that right, and that authority from the day that the
14 subscriber signed up.

15 But what did they do? They wanted to keep the
16 revenue. And that's the profit motive that I talked about
17 earlier. One of the benefits of being able to see these
18 e-mails is you not only get to see what Cox did, but you get to
19 see why they did it.

20 So why would they not take what seems like the right
21 course, the legal course, the appropriate course, the course
22 that they told their subscribers that they were going to take,
23 which is to terminate people that engage in illegal conduct?
24 Why wouldn't they do that?

25 Well, you see it in their own e-mails. You're going

1 to hear a term and you're going to see a video about the "soft
2 term." Term doesn't mean like term paper. It means like
3 termination. It's a suspension that is called a termination on
4 the likelihood of reactivation. For DMCA, we don't want to
5 lose the revenue. So for copyright infringement, translation,
6 we don't really terminate these people because we don't want to
7 lose the revenue.

8 And look at the next one. It's kind of like an
9 under-the-table procedure. So not only is it a false
10 procedure, but it's a stealth procedure. It's an
11 under-the-table procedure.

12 Here's another one. "We have been soft terminating
13 for DMCA, copyright infringement, because we didn't want to
14 lose the revenue, but if the gross bandwidth of users are
15 costing us way more than we're making from them, it makes sense
16 to terminate them."

17 So who does Cox terminate? It terminates the gross
18 bandwidth abusers that Cox loses money on.

19 And who does it keep? The repeat infringers --
20 repeat copyright infringers because Cox wants to keep the
21 revenue because they're not losing money on them. And why
22 aren't they losing money on them? How much does Cox pay for
23 the content of the illegal copyright infringement? If you go
24 to see a movie on the Cox cable channel, they're paying some of
25 their biggest people they do business with, HBO and whatever,

1 they have a business relationship with them, and Cox has to pay
2 for that content.

3 But Cox is selling Internet access where the profit
4 margins go as high as 94 percent, where their gross revenues
5 are \$3 billion, and how much are they paying for that content?
6 The songs that they are stealing from the artists, they're
7 paying nothing for. That's why the profit margins are so high,
8 because they're making available content that they're not
9 having to pay for. And you know the content they are making
10 available is stolen content.

11 Here's another one. This is an example of a customer
12 that I consider to be a habitual abuser. So this is, again,
13 people in the Abuse Group at Cox. In a year was terminated
14 twice and turned back on. This is a miraculous situation
15 because they terminated somebody twice, but the first time
16 they're terminated -- you just saw the earlier e-mail -- click,
17 starts all over again. The blackboard is wiped clean. It's as
18 those they never infringed in the past.

19 So to get terminated twice in one year, means you
20 must be out there all 23 hours a month illegally copying music
21 on the Cox network. But this is somebody that Cox looked at,
22 they terminated twice and turned back on.

23 And Mr. Zabek, who's the head of this unit said, "It
24 is fine. We need the customers."

25 So somebody that's clearly known by Cox to be

1 repeatedly infringing, they don't terminate them. And why?
2 The revenue. They need the customers.

3 Here's another one. This is again, Mr. Sikes, who's
4 in that same unit with Mr. Zabek. Again, internal Cox e-mails.
5 It's Abuse corporate. "I suggest you also cover the
6 possibility that it could be a BitTorrent client running on one
7 of their other computers." So this has to do with a client
8 that was suspected of illegal copyright infringement. They're
9 exchanging e-mails about that.

10 And he goes further to say, "The BitTorrent client is
11 running on one of their computers. They need to uninstall it.
12 This customer pays us over \$400 a month, and if we terminate
13 their Internet service, they will likely cancel the rest of
14 their services. Every terminated customer means lost revenue
15 and a potential detractor to our net promoter score. We should
16 make absolutely certain that we have covered each and every
17 possibility with them to the bitter end before we terminate."

18 Turning a blind eye, willful blindness, not taking
19 the steps, facilitating, providing material support, aiding and
20 abetting the copyright infringers by not terminating them. And
21 why? We want to keep the revenue. We don't want to lose the
22 customers. They are paying us \$400 a month.

23 The profit motive for not doing what was right was
24 the reason Cox violated its own policy by continuing to
25 tolerate what it knew was illegal conduct going on by its

1 subscribers on its network. And in those circumstances, Cox
2 just can't wash their hands and say, it wasn't us. It was our
3 subscribers. Go sue them. Because it was them. They were the
4 ones that made the decision not to terminate. They were the
5 ones that provided the facility to keep the infringement going.
6 They decided not to process the Rightscorp notices.

7 So it wasn't just passive activity on Cox's part. It
8 was active activity which continued to facilitate, to feed, to
9 allow the infringement going on in their network.

10 Now, I've already shown you some of the money slides.
11 I'm going to show you a few more. This shows, again, the
12 financial benefit as being the motivation for Cox not
13 terminating repeat infringers. Again, the same cast of
14 characters.

15 You see Mr. Zabek, "Hey, all. Internal info only.
16 Do not forward." It goes on. "If the customer has a Cox.net
17 e-mail, we would like to start the warning cycle over. Hold
18 for more. A clean slate, if you will. This way, we can
19 collect a few more weeks of payments on their account." Smiley
20 face.

21 Another example of the reason Cox -- this is somebody
22 again who Cox knew was a repeat infringer. Another example of
23 why they didn't terminate them, "because we can collect a few
24 more weeks of payment from their account," smiley face.

25 "Once the customer has been terminated for DMCA, we

1 have fulfilled the objection of the DMCA safe harbor and can
2 start over." So after we terminate, we start over again.
3 When? A year from now? No, right away. Next day. Next week.

4 It goes on further. "But know that once termination
5 happens, we have fulfilled safe harbor."

6 So you may wonder why Cox -- why is Cox bothering to
7 go through this charade where they pretend to terminate? Why
8 did they have to do that? Well, the reason they would have to
9 do it is because there is a federal statute that says that if
10 they actually have a reasonable policy for terminating repeat
11 infringers, they have a safe harbor, they're immune from
12 liability.

13 Well, that is not an issue in this case. Cox is not
14 immune from liability because it did not engage in what was
15 required in order to have that safe harbor protection. If it
16 had, we wouldn't be here today.

17 Last line, "we do not make this information publicly
18 known." Again, stealth, secret, fake terminations so that they
19 can pretend if ever challenged, that they were entitled to safe
20 harbor protections of the DMCA.

21 Here is another one. Again, folks in that same Abuse
22 unit at Cox. "I was chatting with Daryl and it seems to me no
23 one let them know in SAN that DMCA terms -- look at this -- are
24 not really terminations any longer."

25 So if I am terminated for copyright infringement,

1 DMCA terms, they aren't really terminations any longer.

2 Their response to that, "this is not an official
3 thing or part of the M and P. We do not tell customers this."

4 And then another e-mail of the same line showing why
5 they engage in the charade, "remember that we must terminate to
6 receive protection under safe harbor amendments." I already
7 told you that they aren't entitled to protection under the Safe
8 Harbor Amendment.

9 And then underneath that, I don't believe the TOC is
10 terminating the service completely, removing it from ICOMS,
11 they were just clicking terminate and the update ticket, which
12 shows a termination in the customer's ticket history.

13 So they weren't really clicking termination, they are
14 creating a false document by clicking it as though they
15 terminated it.

16 All right. So I think I have given you a decent
17 preview of what are Cox's liabilities. Even though they
18 weren't the ones that were directly copyright infringing
19 themselves, the law makes it clear if you are guilty of
20 contributory infringement or vicarious infringement, you are
21 liable to the same extent as the people that are actually doing
22 the illegal copying. And I have gone through the requirements
23 of each of those and I have gone through a preview of some of
24 the documents we think will show overwhelmingly that Cox is
25 guilty of both contributory infringement and vicarious

1 infringement.

2 So what are the consequences of that? Well, the
3 copyright law provides penalties. They provide amounts that
4 are to be paid, that are to be assessed against people that
5 violate the copyright law when they violate that law. These
6 are statutory penalties. And I have put them on the slide here
7 in front of you.

8 And those statutory penalties are up to \$30,000 per
9 copyright infringed for an innocent infringement. We have got
10 1,397 copyrights. 1,397. Up to \$30,000 per copyright
11 infringed for innocent infringement. Up to \$150,000 for
12 willful infringement. And we believe that you should make a
13 judgment as to the amount of the penalty that Cox should pay
14 within this framework.

15 We believe that the evidence shows that Cox was not
16 guilty of innocent infringement, but it was guilty of willful
17 infringement, which would put it in line for the higher
18 statutory damages.

19 What are the factors that you should consider? Well,
20 there are a lot of factors. Probably the most important one is
21 deterrence. Because unlike some cases, the automobile accident
22 case where you compensate them for what their hospital bills
23 were or what their lost wages were, this is a statutory
24 penalty. And so, we are not required to show how much revenue
25 the artist lost as a result of this illegal conduct. It would

1 be virtually impossible. Because once that BitTorrent file
2 goes out there, it goes out to the world. And so there may
3 have been millions of copies of a single artist's recording.
4 And if that were sold, each one of those sales would have
5 generated revenue.

6 But we don't know how many people copied all those.
7 All we know is a whole bunch of them did. And all we know is
8 that it was made available to all the other people on the
9 BitTorrent protocol. So that's why statutory damages are the
10 method for calculating damages in a case like this.

11 And so, the principal starting point is deterrent.
12 How much of an award must you make to a \$3 billion a year
13 company just from high-speed Internet to get them to pay
14 attention to their responsibilities under the copyright law?
15 That's deterrent.

16 The other factor you may consider is the size of the
17 activity, the willfulness of the activity. These are all
18 factors that the judge will instruct you on at the end of the
19 day. But I wanted to give you a little preview of the amounts
20 we are going to be asking you to consider. Your judgment, not
21 ours, at the end of the case, if you believe that we've carried
22 our burden of showing that Cox is guilty of both contributory
23 infringement and it's also guilty of vicarious infringement.

24 I found it interesting this morning one of the people
25 that didn't make it on the jury, and I think you heard it, was

1 a songwriter. And he indicated how difficult it was for a
2 songwriter to make money. That's the problem we have got.

3 THE COURT: Mr. Warin, let's confine ourselves to the
4 evidence in the case here today and not anecdotal comments
5 about potential jurors.

6 MR. WARIN: That's fine, Your Honor.

7 One of the things that you are going to hear is the
8 difficulty of the songwriter making money. And we're trying
9 to -- representing song writers to address that by having this
10 case against somebody who can put a stop to the illegal
11 infringement on its network. And the way it puts a stop to it
12 is by this jury awarding an award against Cox in a significant
13 amount of money so that in the future Cox will pay attention to
14 the notices so that they will try to root out the repeat
15 infringers on their network, and so that the people that make
16 money from the royalties of the legal sale of their music will
17 have an opportunity to make the money they are entitled to for
18 their work.

19 Thank you very much for your attention. We look
20 forward to talking to you later as we go along.

21 THE COURT: Thank you, Mr. Warin.

22 All right. Mr. Wakefield.

23 MR. WAKEFIELD: Thank you, Your Honor.

24 Ladies and gentlemen, I introduced myself at the
25 beginning of the day today. But again, my name is Jed

1 Wakefield, and I represent Cox Communications. Thank you all
2 for your service and for your attention.

3 The judge said something this morning. He said there
4 are two sides to every story. And that is definitely true.
5 And you just heard one. And I thank you for keeping an open
6 mind while you hear both sides of the story.

7 You heard about BMG and you heard a little bit about
8 notices sent by Rightscorp. But there is a big piece of the
9 story that you didn't hear about Rightscorp.

10 Rightscorp was BMG's copyright enforcement agent.
11 And you heard from counsel that most of the evidence in this
12 case will come from Cox's own files. But Cox doesn't have any
13 evidence of the key thing that the plaintiffs have to prove in
14 this case, and that's that there was actual infringement,
15 first, before they get to whether there was contributory
16 infringement or vicarious infringement.

17 And all the evidence in this case, every bit of it
18 about alleged infringement, comes from this company,
19 Rightscorp. A company out in L.A. that has made its business
20 about monetizing copyrights.

21 And the key fact in this case you didn't hear about
22 is why Cox refused to forward those notices. The key fact is
23 that Cox refused to join in Rightscorp's business. Rightscorp
24 had a proposal for Cox. And that proposal was, we want you,
25 Cox, to send e-mails accusing customers of infringement and

1 demanding money from them. And if we say that they are a
2 repeat infringer -- and we will get to what that means -- it's
3 not what it sounds like. But if we, Rightscorp, say they are a
4 repeat infringer, then you shut off their Internet access until
5 we tell you that we have been paid. And if you cooperate, we
6 will share that money with you, Cox.

7 Cox refused to be a part of this. It refused to
8 demand payments from people, from its customers, based on
9 unproven accusations. It knew then that Rightscorp didn't know
10 key information when it sent out those notices. And the
11 evidence in this case will show that today Rightscorp will not
12 be able to prove key facts about those e-mails, those millions
13 of e-mails that it sent.

14 It can't tell what really happened on a computer. It
15 can't detect somebody copying anything. It can't detect
16 someone transmitting anything. It can't tell that anyone
17 uploaded or downloaded. And the system is riddled with
18 problems. It makes big mistakes. The Rightscorp system also
19 dramatically over-counts alleged infringements, generating
20 extra notices, each one asking for money.

21 And the Rightscorp system can't tell you who did
22 anything. It can't tell you that the person who is identified
23 in Cox's record as its subscriber actually did anything. So it
24 can't tell you the who, the what, or the how many.

25 But Cox didn't refuse to deal at all with Rightscorp.

1 It offered to forward notices to its customers without those
2 settlement offers, those settlement demands, and without
3 shutting off their access. It does this, and it was doing this
4 at the time, with many other rights owners and rights owner
5 agents. It works with HBO and movie studios and TV channels,
6 and it cooperates with them, and it has worked out systems with
7 them, and it forwards their notices. And it works with its
8 subscribers to address issues about purported infringement.

9 And in one of the e-mails you saw that was held up as
10 evidence of this bad intent by Cox, an e-mail from Mr. Sikes
11 from 2014, there were highlighted parts. But at the end of it
12 all, it says -- I mean, first of all, it notes that they are
13 addressing concerns. It could be a kid using a wireless
14 network. It might not be the subscriber. But if you all think
15 this has been covered in detail, go ahead and terminate. Cox
16 wasn't playing games. It was looking out for customers,
17 addressing the problem, figuring out what happened, and not
18 relying on a bunch of hearsay from some company out in L.A.
19 that was dumping millions of e-mails on it.

20 Now, Cox works with copyright owners, but it doesn't
21 put itself in the position of the judge or the jury and decide
22 if there has been an infringement. It can't tell that from an
23 e-mail. It can't tell that just because an e-mail says there
24 is an IP address and there's a song title. Those things can be
25 mistakes.

1 If somebody wants to take money from somebody, from a
2 Cox subscriber, there is a process for that, and Cox cooperates
3 in that. Companies can file John Doe lawsuits. They can file
4 them against one subscriber or lots of them. And it can serve
5 subpoenas on Internet service companies like Cox to get
6 subscriber information. And Cox cooperates with those. And
7 then the rights owner can reach out to that subscriber and say,
8 we think you owe us money. And if they got the right guy, say,
9 you got me, I'll settle. And if they got the wrong person,
10 that wrong person can make them prove their case.

11 But Rightscorp -- or as it was called at the time,
12 Digital Rightscorp, did not want that process used. As they
13 said, "we do not want our clients to use this information to
14 subpoena or sue." We don't want to test our case against these
15 individuals that we're accusing. Instead, we want you to shut
16 off the Internet to them until they pay us.

17 And shutting off the Internet in 2015 and back in
18 2012 is a big deal. The Internet isn't a novelty like it was
19 in 1995 when you could see if you have got mail on AOL. The
20 Internet is a daily part and a vital part of our lives. People
21 use it for work. They run businesses on the Internet from home
22 businesses. Or if they work in an office and they need to go
23 home because a kid is sick, they can work from home with an
24 Internet connection. They keep in touch with family near and
25 far, including our troops abroad. They use it to manage their

1 money, to pay their bills, to get alerts about credit card
2 fraud. They use it -- if they are out of work, they use it to
3 look for work. And they use it to deal with health issues, to
4 get health information, to fill prescriptions if they are not
5 able to go to the pharmacy themselves.

6 Now, Cox doesn't provide the Internet. It doesn't
7 provide any of these websites, and it certainly doesn't provide
8 BitTorrent sites. It provides a connection, a pipe to the
9 Internet. Literally, it's a cable company. That's how it got
10 started. It physically put cables into buildings, people's
11 homes, people's businesses.

12 And today it does provide television, cable TV. And
13 it does provide phone and Internet access, and now home
14 security. And when it provides television service, it doesn't
15 supervise and it doesn't control what people watch. It's not
16 in charge of people's television viewing.

17 And when it provides phone service, it doesn't tell
18 people who to call or what to say. It does not supervise or
19 control the phone.

20 And the same is true with the Internet. It provides
21 a connection, but it does not control and it does not supervise
22 what people do on the Internet.

23 Cox's customers decide how they will lead their lives
24 and how they will use the Internet, and Cox only provides an
25 onramp to the information highway. Where people go, what they

1 do, where they drive is up to them.

2 But Cox does not encourage or promote or induce in
3 any way any infringement, and it doesn't profit from it.

4 Cox has an Acceptable Use Policy. Counsel pointed it
5 out. It tells its customers that there are certain behaviors
6 that they want them to abide by. It tells its customers that
7 it has an intellectual property policy and that they should not
8 transmit or disseminate material that infringes any
9 intellectual property rights, patents, trademarks, copyrights.
10 It doesn't encourage anything.

11 Now, more about this company, Rightscorp. As I
12 mentioned earlier, it is a company out in L.A. It calls itself
13 a copyright monetization business. And it claims that it has
14 developed this software that can detect alleged infringements
15 using BitTorrent technology, and it has a business proposal for
16 rights owners. Let us force ISPs to threaten their customers
17 and shut off their Internet access until they pay, and we will
18 share that money with you.

19 And from the beginning of this case, for years,
20 Rightscorp -- years before this case, Rightscorp was behind
21 this case. It helped plan this case. And when this lawsuit
22 was filed, Rightscorp announced, this is our lawsuit.

23 And what did Rightscorp want Cox to do? Let's look
24 at the notices you heard about. First they asked Cox, don't
25 change these notices, send the entire notice.

1 And at the beginning they wanted us to tell -- they
2 wanted Cox to tell its subscribers, your ISP, that's Cox, has
3 forwarded you this notice. It is not spam. So they wanted Cox
4 to vouch for the e-mail. And that's important because
5 Rightscorp was going to send a lot of them. And each one had a
6 link for people to give up their personal information, their
7 name, their address, their e-mail address, their phone number,
8 and their credit card information to pay.

9 They threaten them with \$150,000 per infringement.
10 You heard from counsel that's the maximum statutory damages,
11 except that is not the law. \$150,000 per work is the law. If
12 someone has ten copies, a thousand copies of the same song,
13 that's one statutory damages award. But they were threatening
14 them and including these in each infringement notices. And we
15 will show you that they sent a lot of these notices for the
16 same work to the same person.

17 And they then threatened the loss of Internet access,
18 your ISP service. Again, ISP is Internet service provider.
19 Your service could be suspended if this matter is not resolved.

20 And then there was the link. "If you click on the
21 link below and log into Rightscorp's automated settlement
22 system for \$10, you will receive a legal release from the
23 copyright owner." That was only for that one e-mail and that
24 one observation of an alleged infringement. If there were
25 others, even some taken on the same day for the same alleged

1 song, Rightscorp would then ask for money for each one of
2 those. And that amount later went up -- as counsel said, up to
3 \$20, and later to \$30.

4 And when Rightscorp said that there was more than one
5 of these e-mails that it was alleged to be now a repeat
6 infringer, they said, we want you, Cox, to suspend that
7 person's Internet account. Not until you warn them and talk to
8 them and figure out what happened. No, we want you to suspend
9 their Internet until they pay.

10 Cox refused. It said, "as a matter of policy, it
11 does not accept or forward notices such as yours, which make
12 settlement demands." But it agreed to forward those notices if
13 Rightscorp would remove the settlement demands. And Rightscorp
14 refused to ever do that.

15 Rightscorp sweetened the deal. It said, "after some
16 reasonable initial compliance, we are willing to discuss a
17 revenue share with Cox to offset legitimate costs." In other
18 words, you should do this, there is money in it for you.

19 Again, that's not Cox's business. It gets paid from
20 its subscribers for its services. It doesn't go to them and
21 demand money based on unproven accusations.

22 Again, Rightscorp tried to convince Cox saying, "we
23 can add an item to an income statement." This was from a list
24 of talking points that Rightscorp prepared to get ready for a
25 phone call to try to convince Cox to join in this program.

1 Now, you may hear some evidence that it could have
2 been possible for Cox to remove the settlement demands, to go
3 into each of these millions of notices and change them and
4 forward them. But Rightscorp did not want that to happen.
5 Rightscorp made clear, this was their program, and you'll hear
6 testimony from Mr. Steele, Rightscorp's president and chief
7 operating officer, that he did not want anyone -- he never
8 communicated to Cox that they should forward these notices
9 without settlement offers.

10 And Rightscorp's position did not change. Here is
11 another letter communication to Cox saying, forward -- in this
12 case it was 452,000 e-mails, forward those hundreds of
13 thousands of e-mails, each one asking for money. "Suspend the
14 infringer's service," this is an accused person, not someone
15 who has been determined to be an infringer, but suspend their
16 service until we've been paid and then reconnect them when we
17 tell you you can do that.

18 Cox refused to do this, as I said, because it could
19 not rely on these notices as proof of infringement. Because it
20 knew then that you can't tell based on Internet protocol
21 addresses, these IP addresses, who is actually involved in
22 things. And the evidence has shown as we've gotten into this
23 case that the Rightscorp system was flawed. It did not tell us
24 who did anything, it did not tell us the what, and it did not
25 tell us the how many.

1 Let's start with the who. To understand that, it's
2 helpful to understand how people use the Internet in their
3 homes and businesses. Cox, as I mentioned, it provides a
4 cable, a connection to the home. And if it's providing
5 Internet service, it provides a connection to a cable modem.

6 And that modem is assigned temporarily an IP address.
7 Sometimes that IP address is there for a long time if the modem
8 is left on and nothing changes. Sometimes that IP address
9 turns over and changes if the modem is shut off or for other
10 technical reasons.

11 But many, many people connect that modem to a WiFi
12 router, a wireless antenna that lets any Internet-enabled
13 device connect to the Internet. Many people have this in their
14 homes. Many businesses like Starbucks have WiFi networks
15 people can get on. And anyone in range of a WiFi router can
16 connect. If it's password protected, unless someone has stolen
17 a password, they need the password. But if it's not -- and
18 many of these are unsecured -- then anyone can get on. Anyone
19 in range of that WiFi router antenna can connect.

20 Cox, as the cable company, it knows the subscriber
21 name of who has that account. But it doesn't know what people
22 are using the Internet that's connected to that account. It
23 could be a person upstairs in this picture. Maybe that's a
24 subscriber, maybe it's not. I could be a guest. A kid who is
25 home visiting from college. It could be a neighbor who is

1 within access of the WiFi antenna.

2 And many people, upwards of 65 percent and growing,
3 use WiFi routers in their homes with high-speed Internet. So
4 the Rightscorp software can't identify who. And you will hear
5 that not from me, you will hear it from their own witnesses.

6 And by the way, I mentioned Starbucks as an example.
7 But there are coffee shops, hotels, businesses that use
8 wireless networks as well, that are open, and Cox customers
9 include these small businesses.

10 Christopher Sabec, Rightscorp's founder, was asked
11 about this in his deposition. Admitted, we don't know who did
12 it.

13 Greg Boswell, a Rightscorp programmer, acknowledges
14 that anyone within range of a WiFi antenna and WiFi router can
15 connect. It could be a neighbor, it could be someone in a car.
16 I could be a guest at a hotel. Rightscorp admits all of this.
17 So they don't know who did it.

18 They also send notices in error. And to understand
19 this, it's helpful to understand a bit more about BitTorrent
20 technology. There was a suggestion that BitTorrent is somehow
21 a criminal piece of technology, that it's just used for music
22 stealing. It is used by NASA. It's used by major software
23 companies to distribute -- I mean, to transmit updates to their
24 software. It's used for countless legal and legitimate
25 purposes.

1 A torrent payload describes the contents that someone
2 can find. And that can be authorized or unauthorized content.
3 It's like a box that you can put anything in. It could be not
4 just music or movies or software. It could be posters,
5 photographs, anything that can be digitized. It contain
6 articles -- it could contain articles, it could contain music.
7 In this example we see some articles, some posters, and a CD of
8 a Bruno Mars record.

9 BitTorrent users can download the whole torrent or
10 they can choose to download a part. So if someone is looking
11 for something specifically, they can download just that,
12 including the authorized or legal content. And the authorized
13 or legal content isn't just documents and so forth. There are
14 artists who authorized their music to be released on
15 BitTorrent, including BMG artists, including well-known
16 musicians.

17 So the notion that BitTorrent equals infringement is
18 just not going to be supported in this case.

19 But a BitTorrent user can choose part of it. And
20 this system has identified legitimate non-music files and
21 called them music. In this case, Rightscorp identified for one
22 example this article about the Grateful Dead performing at
23 Wembley in 1972. And they said it was a song. And they sent
24 somebody an infringement notice asking them to pay for
25 infringing the song. That person, who had that document, did

1 not infringe that song. That's not a song, it's a piece of
2 paper.

3 And there are other problems with the system. The
4 Rightscorp system sends notices after detecting not the whole
5 payload, not the whole box, but just 10 percent. It's not
6 actually looking for what's on someone's computer. It's
7 looking for metadata, it's looking for signals about what is
8 available. And if it sees a 10 percent match, it assumes that
9 everything in the box is there and is being made available to
10 download. That 10 percent could be authorized, could be legal,
11 could be something that Rightscorp is not authorized to try to
12 settle anything for.

13 And the third big problem is that Rightscorp counts
14 the same thing over and over again and it calls each one a
15 different infringement.

16 So I mentioned Rightscorp just observes metadata, it
17 observes information about a BitTorrent without seeing that
18 anything is on a computer. But if it sees information and it
19 concludes that it means that there is, for example, one CD with
20 12 songs on it, it will send 12 notices to the IP address that
21 it detected. So that one person with one CD, assuming they
22 have it -- and we don't know -- would get 12 notices.

23 If that computer is just left running for a month,
24 Rightscorp will go back every day and keep looking at it, and
25 each time it sees that same alleged CD, it says, aha, 12 more.

1 I looked again, 12 more. I looked again, 12 more. And so for
2 one month there would be 360 separate infringements according
3 to Rightscorp, but with one CD, one time.

4 And that could range in into settlement demands
5 between \$3,600 to \$10,800 in demands. And that person with
6 that IP address would be called a repeat infringer and they
7 would have their Internet access shut off.

8 And again, you'll hear from Mr. Boswell, Rightscorp's
9 own programmer, that if they saw one work for ten days, that
10 would be called ten infringements, even though it was one
11 thing.

12 But it's worse than that because Rightscorp would
13 count the same thing multiple times in one day and call it
14 repeated.

15 On March 9, 2012, Rightscorp sent six notices to Cox,
16 according to Rightscorp's own records, for a single IP address
17 with one song by ZZ Top. It sent notices at -- on the same
18 day, 4:43, it said, aha, an infringement. 5:22, aha, an
19 infringement. 5:47, 6:13, 6:51, and 7:30, all the same day.
20 And it did this again and again.

21 You heard about how BMG sent somewhere around a
22 million notices. It actually sent 7,620,000 notices according
23 to Rightscorp's records. 7 million notices. You heard from
24 counsel that Cox has about four-and-a-half million subscribers.
25 That's more notices of alleged infringement than there are

1 subscribers on the Internet.

2 You also heard that something like on Cox's Internet
3 service. Cox doesn't have 7.6 million customers.

4 You also heard that there's going to be a study
5 introduced in this case that shows that 10 percent of Cox
6 customers say they use BitTorrent to download music. It's not
7 true. That survey will come in, and you will get a chance to
8 view it yourself, but it doesn't ask people if they use
9 BitTorrent and it doesn't ask people if they download files
10 that they don't have authorization to download. It does not
11 show it. And it also doesn't make sense that one out of ten,
12 that if you take ten subscribers, that one out of ten of them
13 were using BitTorrent to download music.

14 So the system is not accurate. It can't tell you
15 who, it can't tell you what, it can't tell you how many. What
16 does BMG have to say about this? They hired this company to
17 send out these notices. What did they do? There won't be
18 evidence that they verified that this system works.

19 Mr. Hauprich, the vice-president, will testify,
20 testified in his deposition, that the accuracy of the system
21 for him is measured in receiving some payments. If people who
22 have been threatened or who have had their Internet access cut
23 off, pay some money, it means they must be guilty.

24 And there's another key problem with the Rightscorp,
25 software. And that is, for the whole period of time when the

1 evidence that's going to be presented in this case of alleged
2 infringement Rightscorp was generated, that whole period of
3 time they were changing that software and they were erasing
4 parts of that software and writing over pieces of that
5 software. And they didn't keep any logs, they didn't use a
6 revision control system. And so that software, that whiz-bang
7 system that tells us it can prove infringement, is gone. We
8 only have software that came later.

9 And the timeline on this is important. On March 7,
10 2012, BMG and its in-house attorneys were discussing bringing
11 this lawsuit. A year later, Rightscorp -- this is March 20,
12 2013, Rightscorp and its attorneys retain an expert to get
13 their software ready for litigation. You're going to hear from
14 that expert. Her name is Barbara Frederiksen-Cross. If she
15 had been asked at the time, should we be saving this stuff as
16 we keep changing it, she would have said, yes, absolutely. But
17 they didn't ask her and they kept changing it and they kept
18 erasing parts of it.

19 They filed their lawsuit November 2014. Did they
20 stop erasing their code? Nope. They kept changing things.
21 They finally had to produce it in this case July 2015. They
22 finally produced that new software. Everything up until then
23 we can't see because it wasn't saved. They wrote over that
24 earlier software.

25 There's another key piece of the timing in this case.

1 As I mentioned before, Cox told Rightscorp again and again, it
2 told them before September 2011, but it told them again on
3 September 2011, we will not accept notices asking for money.
4 We won't do it.

5 Now, Rightscorp and BMG sound surprised that their
6 e-mails were going to this brick wall. But Cox told them, we
7 will not accept them. December 2011 after being told
8 unequivocally, we will not accept these notices, Rightscorp and
9 BMG entered into their representation agreement. And after
10 that, Rightscorp began sending these notices, knowing full well
11 that every one of them was not going to be accepted.

12 When Rightscorp and Cox were in these discussions and
13 Rightscorp was trying to continue to get -- was continuing to
14 try to get Cox to join its program, they began to threaten Cox.
15 They said, we've been taking a baby step approach with these
16 numbers, but if we wanted to, we could have sent more. We
17 could have sent 27,000. You would have had to terminate people
18 because, again, they were asking us to shut off people's
19 Internet access until they paid.

20 Cox would not be pressured by this e-mail and it said
21 no. And sure enough, Rightscorp followed through on its
22 threat. It went from sending a few hundred to up to about a
23 thousand notices in a month to sending 74,000 e-mails in one
24 month. In fact, on two days in October 2011 it sent over
25 40,000 e-mails just to Cox.

1 So why did Cox blacklist and refuse to accept these
2 e-mails? Was it because it needed to profit from one or two
3 subscribers that you saw e-mails about? No. It was because it
4 was being threatened with a deluge of e-mails, of millions of
5 e-mails, and because Rightscorp refused to take out these
6 settlement demands. It refused to accept payment -- to accept
7 and send payment demands because they were based on unproven
8 allegations. And sure enough, it went on to receive
9 7.6 million e-mails. And overall, 22-and-a-half million
10 e-mails, 22-and-a-half million e-mails were sent by Rightscorp
11 to Cox.

12 Cox doesn't promote and it doesn't help and it
13 doesn't encourage copying by anyone. You heard about sites
14 like ThePirateBay and the old sites like Napster. Cox doesn't
15 operate any sites like that. It just provides a connection to
16 the Internet, and it doesn't try to convince people to do it,
17 it discourages them from doing it, it has policies against it.

18 And it can't go out and block P2P technology,
19 peer-to-peer technology, like BitTorrent. There was a
20 suggestion in one of those slides that Cox knew that BitTorrent
21 was being used, it must know that it's bad. Well, A,
22 BitTorrent is not criminal. BitTorrent can be used for
23 legitimate purposes. But B, because of that, Cox isn't allowed
24 to slow it down or stop it. It can't do that.

25 And by the way, Rightscorp says that. Rightscorp in

1 its presentation to Cox said, ISPs, Internet companies like
2 Cox, may want to block P2P, but it is not legal to do so.

3 Cox does not have the right and ability to supervise
4 its customers. It does not control what Web sites they visit.
5 It can't stop peer-to-peer technology, it's not allowed to do
6 that. And Cox does not have a direct financial interest in
7 user copying.

8 You heard from counsel that Cox spends a lot of money
9 on content. That's because Cox provides TV services and it
10 gets paid for that. It gets paid when people watch video on
11 demand. It has -- you heard about Pandora, a streaming service
12 that people can subscribe to. Cox has an arrangement with
13 Pandora where people can get Pandora through the Cox TV
14 Internet service. So when people get music without
15 authorization, without any payment, that is in competition with
16 Cox. It doesn't make money from that, it loses money from
17 that. It's not in its interest.

18 But it's also not in its control to stop it. It does
19 work with rights owners. And it does try to -- it does forward
20 notices and it does work with customers to figure out what's
21 going on. And if someone else is using their WiFi, to help
22 them secure it. But it's not profiting from that.

23 It does not have a direct financial interest, which
24 is what the law requires to find vicarious liability. It does
25 not have any financial interest in infringement. In fact,

1 Rightscorp itself said, you can reduce the cost per subscriber
2 by getting rid of these high bandwidth consumers, people
3 watching movies and downloading music.

4 So what is the evidence in this case going to show?
5 It's going to show that Cox cooperates and it works with rights
6 owners. It responds to subpoenas when there's a dispute and
7 someone wants to get paid. But it did not induce, it did not
8 cause, it didn't encourage, it didn't contribute to music
9 sharing. It didn't supervise and it didn't control and it does
10 not do so now any music sharing. And it didn't have any
11 financial interest or benefit from this alleged copyright
12 infringement.

13 So why are we here and what did Cox do? It stood up
14 for its customers. It stood up for customers to prevent them
15 from getting their Internet access shut off until they paid
16 money based on unproven allegations. And at the end of this
17 trial, those allegations will remain unproven because plaintiff
18 will not meet its burden of proof.

19 I want to thank you all very much. I know it's been
20 a long day already and we've been talking a lot, but on behalf
21 of Cox and our team here, I want to thank you for your service
22 and for your attention and for the hard work I know you're
23 going to do.

24 Thank you all very much.

25 THE COURT: Thank you, Mr. Wakefield.

1 All right. Let's take our mid-afternoon break now.
2 And take 15 minutes, we'll come back at ten minutes to 4:00 and
3 we'll begin the testimony in the case.

4 All right. Thank you. You are excused.

5 NOTE: At this point the jury leaves the courtroom;
6 whereupon the case continues as follows:

7 JURY OUT

8 THE COURT: All right. Do we need to discuss
9 anything before this first witness testifies? Have we got it
10 all straight?

11 MR. BUCKLEY: Your Honor, we are going to have issues
12 with respect to the second witness, Ms. Frederiksen-Cross, but
13 I don't know whether we are going to get to her today.

14 THE COURT: Yeah, I would --

15 MR. BUCKLEY: But -- so we can wait.

16 THE COURT: Okay. Yeah. Let's wait until his
17 testimony is over and then I'll hear anything you'd like to
18 say.

19 MR. WARIN: Your Honor, I didn't want to interrupt
20 opposing counsel during their opening, but the word "threaten"
21 was used four times. And I think that's not consistent with
22 this Court's ruling with respect to derogatory terms with
23 respect to Rightscorp. I just didn't want to interrupt, but it
24 was mentioned four times.

25 THE COURT: Okay. You know, it's opening statement.

1 You referenced how they were stealing everything in sight, and
2 your opposing counsel --

3 MR. WARIN: I might have done that.

4 THE COURT: Yeah, and your opposing counsel kind of
5 looked at me like, you know, we're going to let it go. So
6 let's stay within the orders that we have issued, but I
7 understand opening statement things --

8 MR. WARIN: Thank you, Your Honor.

9 THE COURT: -- trying to send a message.

10 All right. So we're in recess. We will come back
11 at -- what'd I say -- ten minutes to 4:00.

12 All right. Thank you.

13 NOTE: At this point a recess is taken; at the
14 conclusion of which the case continues in the absence of the
15 jury as follows:

16 JURY OUT

17 THE COURT: All right. One matter you wanted to
18 discuss, Mr. Bridges?

19 MR. BRIDGES: Yes, Your Honor. Thank you.

20 During Mr. Warin's opening, he alluded to testimony
21 that would be coming in from the first witness, Mr. Hubert, who
22 is, I believe, CEO of BMG, and he was talking about that some
23 of the testimony would extend to discussions about harms to
24 songwriters and the like. And that's really verging on -- that
25 is opinion testimony. That's 701, 702.

1 We had a *Daubert* motion over an expert on those
2 issues, and we don't believe that this testimony should go in
3 that direction. I'd rather resolve that now rather than have
4 to pop up as questions arise.

5 THE COURT: Okay. Well, I think it's fair game for
6 them to talk about revenues and where those revenues go and
7 they go to the copyright owners. The added comments in the
8 opening statement, that's a legitimate concern.

9 So we're -- Mr. Allan, you've popped -- you've
10 jumped -- you got up. Where are the boundaries?

11 MR. ALLAN: Yes, Your Honor.

12 So, look, Mr. Hubert is the head of the company.
13 He's certainly not going to give overall opinion testimony, but
14 we do have the burden of proof here. We do have the burden of
15 proof on damages. They've just made that very clear to the
16 Court and the jury.

17 Mr. Hubert is simply just going to say that this
18 problem, piracy and the issue of online piracy, BitTorrent is a
19 problem for the business and a problem for their songwriters,
20 and it's not going to really go much beyond that to be honest
21 with you. Not going to get into any detailed macroeconomic
22 analysis of any of this stuff. It's just going to say, yeah,
23 it's a problem and it causes a problem to our business.

24 THE COURT: Okay. Reduction in our profitability,
25 our profits, our bottom line, right, and --

1 MR. ALLAN: Correct.

2 THE COURT: -- for the copyright owners?

3 MR. ALLAN: Right.

4 THE COURT: All right. Mr. Bridges, what's the -- or
5 Mr. Buckley, what's the problem with that?

6 MR. BRIDGES: Your Honor, if he's going to give
7 accounting information about loss of sales that's based on
8 personal knowledge, fine. If he wants to say, "It's just
9 tough," that's over the line, Your Honor. I think if he wants
10 to say this case is about these issues and these harms
11 experienced in these circumstances, based on his personal
12 observation, that would be fine. But I don't -- if we look at
13 the pattern of other witnesses they have, the CEO of BMG is not
14 the person with that personal knowledge. This is -- this is
15 the person that paints a canvas of a broad worry and concern,
16 and we believe that's form of opinion, Your Honor.

17 THE COURT: Okay. I think you're cutting that --
18 cutting the edges a little too sharply. I think he's -- he's
19 the CEO of the company. He's looking presumably at profits and
20 losses and revenues and whether they're going up and whether
21 they're going down or where they're -- where they are or they
22 aren't consistent and where the problems are. So identifying
23 the fact that BitTorrent -- that loss of revenue from copyright
24 infringement I don't think is going too far, but --

25 MR. BRIDGES: Your Honor, it wouldn't be if he's

1 going to be precise about lost revenue. I do notice that in
2 the discussion of statutory damages, the only factor Mr. Warin
3 referred to was deterrence, which he I believe improperly
4 referred to as a penalty.

5 THE COURT: Yeah.

6 MR. BRIDGES: And that's a separate discussion for
7 another day.

8 THE COURT: It is.

9 MR. BRIDGES: But I think that there's a mood that is
10 being intended here by this intended opinion testimony, not
11 facts, and we would ask that the testimony be -- contain the
12 facts.

13 THE COURT: Let's limit it to the facts. But I think
14 he can reach some conclusions based on the facts, based on
15 what's going on in his business and that's -- that I think is
16 permissible and that's what I was trying to say.

17 MR. BRIDGES: Thank you, Your Honor.

18 MR. ALLAN: Thank you, Your Honor. And I'll just
19 note that obviously, you know, the fact that we -- we've taken
20 clearly the position that we cannot prove actual damages. It's
21 impossible. So trying to pigeon hole us into a testimony where
22 he has -- he can only opine on this specific harm to these
23 specific copyrights is not realistic.

24 One other housekeeping matter, Your Honor. In terms
25 of the exhibits, we've got one exhibit that we'll introduce

1 with Mr. Hubert that has no objection, so if it pleases the
2 Court, I'll move it into evidence now or we can do it through
3 his testimony.

4 THE COURT: You want to have him identify it and
5 demonstrate it that you understand -- that he recognizes it and
6 can testify about it?

7 MR. ALLAN: Be happy to do that, Your Honor.

8 THE COURT: All right. Let's do it that way.

9 MR. BRIDGES: One last thing, based on what Mr. Allan
10 said, I would like for the testimony to be about BMG, the
11 plaintiff, rather than nonparties in the industry.

12 THE COURT: Carly Simon lost revenues and she's in
13 terrible straits as a songwriter and singer, is that what you
14 mean?

15 MR. BRIDGES: Anyone other than the plaintiff, Your
16 Honor.

17 THE COURT: Okay. All right. Well, I don't know why
18 there would be testimony about anybody other than the
19 plaintiff, but make your objection if and when.

20 And only one of you is handling each witness. Right?
21 And so we're not going to have multiple people popping up.
22 Good. All right. I know that can be hard sometimes, but sit
23 on your hands.

24 All right, Joe. Let's get our jury.

25 (JURY IN AT 4:01 P.M.)

1 THE COURT: All right. Please be seated. First
2 witness, is it you, Mr. Allan?

3 MR. ALLAN: Yes. Thank you, Your Honor.

4 THE COURT: All right.

5 MR. ALLAN: Your Honor, we call -- plaintiffs call
6 Laurent Hubert.

7 (THE OATH WAS ADMINISTERED.)

8 THE COURT: Please proceed.

9 MR. ALLAN: Thank you.

10 MR. LAURENT HUBERT,

11 having been first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ALLAN:

14 Q. Good morning -- or good afternoon, Mr. Hubert. How are
15 you?

16 A. Good. Thank you.

17 Q. Could you state your name for the record, please?

18 A. Laurent Hubert.

19 Q. And where do you work?

20 A. I work at BMG.

21 Q. And what do you do there?

22 A. I am the president of creative and marketing.

23 Q. And I'm from Fairfax County. You sound like you're not
24 quite from around here. Where are you from?

25 A. Originally from France, and I came to this country about

1 27 years ago, and I became an American citizen about eight
2 years ago.

3 Q. Very good.

4 What do you do at BMG? What's your job
5 responsibility?

6 A. I oversee marketing and credit functions as well as some
7 other business functions.

8 Q. Very good.

9 Could you briefly describe for us the business of
10 BMG?

11 A. We are a music right company involved in different aspects
12 of the music business from recording music to music publishing.
13 And music publishing is the majority of our business, the
14 lion's share.

15 Q. Thank you.

16 Music publishing. What is that?

17 A. We are the partner of a songwriter. We make sure that we
18 provide them with creative and marketing support, as well as
19 handle all the administrative functions related to that
20 activity and we enforce their rights.

21 Q. You said songwriter. What's a songwriter?

22 A. A songwriter is somebody who writes the music and the
23 lyrics of a song.

24 Q. So is the songwriter when I flip on the radio and people
25 are singing the tunes, is that the songwriter?

1 A. Sometimes, but most often the case, it's not. It is
2 somebody who will write a song for an artist to record.

3 Q. Does BMG have a role with helping songwriters earn a
4 living?

5 A. Absolutely. That's our primary goal is to enforce the
6 copyrights and making sure those copyrights become valuable.

7 Q. When you say the primary role is to enforce the
8 copyrights, what do you mean by that?

9 A. Well, for us, we have to license those rights and making
10 sure that we provide them with a number of opportunity so they
11 can further their craft and exploit these copyrights.

12 Q. So we'll talk about the licensing in a moment, but how is
13 it that BMG has the ability to license?

14 A. We own or control the copyrights, and the copyright is the
15 protection for us and the protection needed for us for the
16 songwriter to earn a living.

17 Q. Is there some sort of contractual relationship that the
18 company has with the songwriters?

19 A. There is.

20 Q. And how does that work?

21 A. Typically, there's two type of contract. One where we are
22 the corner of the copyright with the songwriter, and we have
23 obviously an exclusive license to administer those rights, and
24 we will make anywhere between -- typically north of 75 percent
25 of those royalties.

1 The other scenario is where we do not own a
2 copyright. The ownership rests with the writer, but we do have
3 exclusive rights to administer the copyright and we remit
4 anywhere between 75 and 95 percent of those royalties to the
5 writer.

6 Q. So on the co-publishing side, what do you mean you remit
7 75 percent to the songwriter? What does that mean?

8 A. For every dollar that we collect, we would pay out 75
9 cents to the writer and we would keep the difference, 25 cents.

10 Q. And that's generally with respect to co-publishing
11 arrangements that the company has with songwriters?

12 A. That is generally the case.

13 Q. And then explain to me the administration revenue
14 breakdown again.

15 A. On the administration side, essentially we pay a higher
16 royalty payout. Typically, it can be 80 percent, as high as 95
17 percent. So we would keep five to 20 percent of that royalty.

18 Q. So BMG would keep five to 20 percent?

19 A. Yeah.

20 Q. The rest would go to the songwriter?

21 A. Yes.

22 Q. Why is it that you think BMG is an attractive partner for
23 songwriters?

24 A. Well, first and foremost, we get to enforce the copyrights
25 of our songwriter, but also we make at their disposal a global

1 infrastructure. We have deep resources in the creative
2 community. We have large teams both on the marketing side, on
3 the creative side, also on the administration side to ensure
4 that we collect those royalties and remit those royalties
5 properly.

6 Q. So the royalties, is that part of the licensing
7 arrangement?

8 A. It is.

9 Q. Can you explain a little bit about how the songwriters
10 actually earn a living? How they get paid?

11 A. Every time a song is downloaded or streamed or heard on
12 the radio or placed in a movie, a commercial, or a TV series,
13 it leads to a royalty and there's a royalty payout.

14 Q. Even songs that you hear on the radio --

15 A. Yes --

16 Q. -- receives a royalty?

17 A. -- absolutely.

18 Q. You mentioned a few moments ago copyrights. Are
19 copyrights an important part of your business?

20 A. They are our business. Without copyrights, we would not
21 have, again, the ability to collect royalties on behalf of our
22 songwriters.

23 Q. Why is that?

24 A. Because they are there for our protection to -- to make
25 sure that we license and those copyrights are not used without

1 permission and compensation.

2 Q. Are -- would you consider copyrights to be an asset of
3 BMG?

4 A. Absolutely. A copyright is very much like property
5 rights, like a house title or a car title.

6 Q. Are you familiar with the copyrights that are at issue in
7 this case?

8 A. Yes, I am.

9 Q. Do you have any understanding of roughly how many
10 copyrights there are?

11 A. Approximately, 1400.

12 Q. I'd like to hand the witness an exhibit, if I may.

13 Mr. Hubert, I've handed you an exhibit here that's
14 been labeled PXS 001. Could you take a look at it and tell me
15 if you recognize it?

16 A. Yes, I do.

17 Q. And what is it? Do you know what it is?

18 A. Yes. Those are the copyrights asserted in this case.

19 Q. And do you know how this document was put together? Do
20 you know what it consists of?

21 A. Consists of -- this is information from copyright
22 registration. I can see a copyright registration number, a
23 song title, songwriters, as well as recording artists.

24 Q. Is it a summary of the copyrights that are at issue in
25 this case?

1 A. I believe it is.

2 MR. ALLAN: Your Honor, I'd move the admission of
3 PXS 001.

4 THE COURT: All right. Any objection?

5 MR. BRIDGES: No, Your Honor.

6 THE COURT: All right. Proceed.

7 BY MR. ALLAN:

8 Q. And, again, just looking at this first page -- and I
9 recognize that there are a number of pages in this document,
10 Mr. Hubert. Just -- is the -- the copyright registration
11 number, what does that mean to you?

12 A. Well, that's a -- there is -- it's a -- the registration
13 of the copy -- the protection of the copyright, registration of
14 copyright. It's under which a right is protected, a
15 registration number.

16 Q. And what is the importance of the song title? What does
17 the song title identify?

18 A. Well, the song titles -- can you repeat your question?
19 What do you mean?

20 Q. Yeah, what -- I mean, what -- is there a way to refer to
21 your works other than a song title?

22 A. We typically refer that as a composition.

23 Q. And do you refer to the composition if you want to talk
24 about a specific composition by the title of the song?

25 A. Yes.

1 Q. And the next column references songwriters. Are these the
2 folks that we talked about that actually write the music and
3 the lyrics?

4 A. That is correct.

5 Q. What is the recording artist?

6 A. It's the artist will record that composition or that song.

7 Q. Okay. And so does the -- is it -- does the -- BMG refer
8 to the composition by the song recorded by the recording
9 artist?

10 A. Yes. The song title is essentially the common element
11 that will include the song composition.

12 Q. And flip through the exhibit, if you would, please,
13 Mr. Hubert. Does BMG have relationships with various of the
14 songwriters listed here on this summary exhibit?

15 A. We do.

16 Q. Very good.

17 How many songwriters does BMG represent?

18 A. Approximately 15,000.

19 Q. Tell us a little bit about the types of songwriters that
20 the company represents. Is it, for example, one particular
21 genre, musical genre?

22 A. We have all type of songwriters writing in all musical
23 genre. We have songwriters who have enjoyed extraordinary
24 success with very popular songs, and we have some other
25 songwriters who write beautiful songs but may not have the

1 benefit of enjoying the same success. And the reality is it is
2 a rarity to have a songwriter that has a continual success.
3 It's a very competitive business.

4 Q. Thank you.

5 I think earlier you testified that BMG is a --
6 considers itself a partner with these songwriters?

7 A. We are.

8 Q. How so?

9 A. Well, we co-own the copyrights in many cases, obviously.
10 But most importantly, if they don't earn royalties, we don't
11 earn any royalties, so our economic interest is absolutely
12 aligned.

13 Q. Is there a creative aspect that the company partners with
14 its songwriters on?

15 A. Absolutely. The --

16 Q. How does that work?

17 A. The creative side of our business is very important, if
18 not a critical part of our business. And our job is to make
19 sure that we foster an environment for them to develop their
20 creative abilities, and we do this in many different ways.

21 Q. Can you give us some examples of ways in which the company
22 assists songwriters on the creative side?

23 A. Yes, we have a creative team. We try to understand the
24 strength of each songwriter. We try to find ways to sometimes
25 pair them with another songwriter, perhaps a producer, perhaps

1 an artist. So our job is on some occasion to also give them
2 some guidance and insight on the songs. We don't write the
3 music obviously, but we try to be as supportive and give them
4 as much service with respect to the creative process.

5 Q. Are there other ways other than sort of the creative
6 process that the company helps songwriters?

7 A. Yes, on the marketing side and the exploitation side, we
8 have a team here too that has deep relationships with movie
9 studios or as licensees, and our job is to find ways for them
10 to find opportunity to place those songs in any sort of
11 opportunities. I mentioned movie earlier or an advertisement,
12 and that's what the team does.

13 Q. So the marketing helps songs get placed in different
14 potential revenue channels?

15 A. That's correct.

16 Q. Is there just sort of a business component to what BMG
17 does for songwriters as well?

18 A. Yes. We handle all the administrative part of the
19 business from the copyright registration which we've seen there
20 from licensing and negotiating the licensing agreements with
21 various parties, sometimes auditing licensees, collecting those
22 funds, producing statements that would then be sent to
23 songwriters, and as I mentioned earlier, also enforcement.

24 Q. Can you give us some of the examples of ways in which
25 people can access BMG's work legally on the Internet?

1 A. Through most of the large and small digital platform that
2 have been licensed, anywhere from Apple to Amazon to Spotify or
3 Pandora. So we have licensed most geo platform in the market.

4 Q. And those you can download BMG's songs or songwriters'
5 songs from those platforms legally?

6 A. That's correct. You can download or stream and -- those
7 songs legally.

8 Q. Speaking of downloading, is all music that people download
9 on the Internet licensed?

10 A. I wish. Unfortunately, that's not the case.

11 Q. Are you familiar with the term -- I mean, is piracy
12 considered to be a term for the unauthorized use of music
13 online?

14 A. Yes, I'm familiar with the term. Essentially, piracy is
15 theft for us.

16 Q. I'm sorry?

17 A. It's theft. It's stealing.

18 Q. Why is that?

19 A. It's the use of a song or composition without proper
20 permission and without compensation.

21 Q. Hasn't piracy always been a problem for the music
22 industry? I mean, isn't it -- hasn't the music industry always
23 faced piracy in one shape or form?

24 A. It has always been a problem, but the reality is with the
25 explosion of digital activity, especially on BitTorrent or

1 peer-to-peer, it has escalated to a very significant magnitude.

2 Q. Speaking of BitTorrent, what is your involvement with
3 BitTorrent? I mean, have you had experience with it -- with
4 the BitTorrent platform?

5 A. Well, I never authorize BitTorrent platform to use the
6 copyrights, but we've had some issues with BitTorrent
7 platforms. And I'm a board member of the National Music
8 Publishing Association, and we've had to deal as best as we
9 could with enforcement with BitTorrent websites. But
10 unfortunately in most cases those sites are outside the U.S.,
11 and litigation is quite challenging.

12 Q. You mentioned the National Music Publishers Association.
13 What is that?

14 A. It's our trade association, and their mission is to
15 advance the cause of our songwriters and the publishers to the
16 marketplace through the Congress, and in some cases also to
17 initiate litigations to protect our interest.

18 Q. And did you have -- and you said you're a board member of
19 this organization, the National Music Publishers Association?

20 A. Yes, I am.

21 Q. And in your capacity as a board member of the National
22 Music Publishers Association, have you had opportunity to deal
23 with or consider the issue of BitTorrent?

24 A. Yes, peer-to-peer and BitTorrent issues are a subject that
25 we've discussed a number of times with the board.

1 Q. And is it something that you deal with in your business at
2 BMG as well?

3 A. I do. This is an issue that comes up in a number of
4 times, yes.

5 Q. Why does it come up at BMG and -- and in your role at the
6 National Music Publisher Association?

7 A. Well, it's an industry issue. It comes up at BMG. It
8 comes up everywhere else because it has had a massive impact on
9 our business.

10 Q. Why is that?

11 A. Because every time a song is uploaded and available in an
12 infinite and put into a BitTorrent website, essentially our
13 songwriters are not getting paid for that and there's a loss of
14 royalties.

15 Q. In terms of the -- in terms of BitTorrent, I think -- I
16 can't remember if you testified -- did you indicate whether you
17 had ever authorized a BMG work to be licensed on BitTorrent or
18 used on BitTorrent?

19 A. I never did. And if BMG had ever authorized, it would
20 have been extraordinary in nature. We would never do that.

21 Q. And why is that?

22 A. Again, the minute a song file is uploaded into BitTorrent
23 environment, it is the equivalent of a perpetual giving away of
24 our music, and we have no way of earning any royalties for our
25 songwriters.

1 Q. And the perpetual giving away of music, that -- can you
2 explain that a bit more?

3 A. Well, it -- essentially it is in an environment that is
4 totally uncontrolled, and millions of people globally can
5 access those files.

6 Q. Has BMG done anything to try to address the issue of
7 piracy?

8 A. As best as we can. It's part of our mission, as I said
9 earlier, to enforce the rights of our songwriters, so we do the
10 best we can to try to contain and curb piracy.

11 Q. And how is it that the company's taken action specifically
12 to address piracy on BitTorrent platforms?

13 A. It's -- because of its massive magnitude, we often rely on
14 third-party suppliers to help us do the work.

15 Q. And have you used a third party to assist BMG in
16 connection with BitTorrent recently?

17 A. Yes, we have.

18 Q. And who is that?

19 A. Rightscorp.

20 Q. Okay. Is -- in your role with the NMPA, have you seen
21 piracy as a problem for the National Music Publishers
22 Association?

23 A. Yes. It's a -- it's a constant issue, and it's a fact of
24 life that we have to live with and we have to manage.

25 Q. Do you see it, as the head of BMG, having an impact on

1 BMG's business?

2 A. It does. It has an impact every day. Every time you have
3 to compete with free, you devalue music and that has
4 significant implication on our business and our songwriters.

5 Q. How so?

6 A. You know, all the millions of royalties that would not
7 have been earned and should have been earned is affecting the
8 livelihood of our songwriters, and in some aspect, affecting
9 their creativity and their ability to create.

10 Q. Were you involved, Mr. Hubert, in the decision to hire
11 Rightscorp?

12 A. Yes, I was.

13 Q. Did you make that decision?

14 A. Yes, I did.

15 Q. Why?

16 A. I thought Rightscorp came with an interesting and
17 compelling solution, or at least the beginning of a solution
18 with respect to curb piracy.

19 Q. What was the solution that Rightscorp brought to you?

20 A. They have a technology that detects infringements on ISP
21 networks.

22 Q. And why was that solution attractive?

23 A. Well, it was attractive to us because, one, we would be
24 aware of those infringements, then we would have the ability to
25 notify the ISPs, in this case, Cox, in the hope that Cox or

1 other ISP would take action.

2 Q. And why was that important to BMG?

3 A. Because we want to find a way again to curb piracy as best
4 as we can and also educate infringers about what they're doing
5 and that they should stop.

6 Q. Is education of the infringers something that's of import
7 to the company?

8 A. It is important.

9 Q. Why?

10 A. It is important to help people understand that what they
11 do, infringing on copyrights in this case, our copyrights, is
12 something that they should not do and hopefully to convert them
13 into accessing music in a legal fashion.

14 Q. And why did you think that what -- well, did you think
15 that what Rightscorp brought to the table was constructive?

16 A. I thought it was a pragmatic and constructive approach to
17 the issue of piracy, yes.

18 Q. And what were the key factors of its system that led you
19 to conclude that?

20 A. I'm sorry. Can you repeat?

21 Q. What were the reasons why you thought it was a pragmatic
22 and constructive solution?

23 A. You know, I thought it really helps everyone, all the
24 parties involved. It's an opportunity for the ISP to clean up
25 its network and be aware of the infringement of its -- on its

1 network. It's an opportunity to speak and contact the
2 subscriber and make the subscriber and infringer aware of that
3 activity. And also in this particular case, we wanted to
4 settle the matter with a modest amount of money which enable to
5 shift some of the costs of infringement from the songwriter to
6 the user and infringer.

7 Q. So there was a settlement angle and component to your
8 partnership with Rightscorp?

9 A. Yes.

10 Q. And what was that? Do you know how that worked?

11 A. I don't know all the details, but the idea was for a
12 modest amount of money we would offer a release to the user.
13 That's what we would do.

14 Q. And why was that important to BMG?

15 A. As I said earlier, I think it is important to educate
16 users about what they're doing and for them to understand it's
17 a serious matter and that they have to stop. And as I said
18 also earlier, I wanted to make sure that all songwriters would
19 derive some of those royalties in their pocket.

20 Q. So the revenues that BMG would earn from settlement in
21 this program, would that have gone -- using the same revenue
22 percentages that we talked about earlier, the songwriters would
23 have gotten a piece of that money?

24 A. Yes. What we would have collected and what we have
25 collected would be paid to the songwriter, the vast majority

1 would be, anywhere between 75 and 90 percent.

2 Q. Mr. Hubert, I want to talk to you a little bit about Cox
3 Communications.

4 A. Yes.

5 Q. Cox Com.

6 Is it your understanding that BMG notified Cox of
7 infringements on its network?

8 A. Yes.

9 Q. And what is your understanding of what Cox did with that
10 information?

11 A. My understanding is that they've done nothing.

12 Q. And what did you expect Cox to do with that information?

13 A. I expected Cox to work with us, frankly, and to find a way
14 to at the very least inform the subscribers.

15 Q. I'm sorry. Say that again.

16 A. At the very least to inform the subscribers about the
17 infringement.

18 Q. And are you -- and did that surprise you that nothing was
19 done?

20 A. Yes, surprising and disappointing.

21 MR. ALLAN: Pass the witness.

22 CROSS-EXAMINATION

23 BY MR. BRIDGES:

24 Q. Good afternoon, Mr. Hubert.

25 A. Good afternoon.

1 Q. Did I pronounce the name correctly?

2 A. I can't hear very well, so I --

3 Q. I'm sorry. Did I pronounce your name correctly?

4 A. You did. You did. Thank you very much.

5 Q. What effort have you personally made to reach out directly
6 to somebody at Cox Communications?

7 A. None.

8 Q. In fact, the only communications from BMG to Cox were
9 through Rightscorp. Correct?

10 A. It is my understanding, although I believed it was a
11 communication between someone in our legal department to
12 somebody at Cox, I believe.

13 Q. It was -- Rightscorp, in fact, used an e-mail from the Cox
14 legal department to communicate to Cox. Correct?

15 A. I don't know.

16 Q. You don't know?

17 A. No.

18 Q. I want to ask you just generally --

19 A. Of course.

20 Q. -- about BMG Rights Management.

21 The only songs at issue in this case are songs where
22 BMG itself owns the copyrights. Correct?

23 A. That is correct.

24 Q. And you discussed earlier a type of copyright called a
25 musical composition. Is that correct?

1 A. Yes.

2 Q. Help me understand, please -- please explain the different
3 types of copyrights and different types of music. Could you do
4 that, please?

5 A. In the music industry or different type of copyrights?

6 Q. Different types of copyrights in a song.

7 A. I could not explain that to you. For me, a song is a
8 copyright.

9 Q. A song is a copyright?

10 A. Uh-huh.

11 Q. A song that a songwriter composes is a musical
12 composition?

13 A. That's correct.

14 Q. And the only types of songs at issue in this case are
15 musical compositions, in other words, what songwriters compose.
16 Correct?

17 A. That's correct.

18 Q. Songwriters who write the music or write the lyrics.
19 Correct?

20 A. Uh-huh.

21 Q. And there is a copyright in what those writers produce.
22 Correct?

23 A. Yes. Again, I'm not a copyright expert, but --

24 Q. I'm sorry?

25 A. I'm not a copyright expert, but --

1 Q. And then other people sometimes record those songs that
2 the songwriters have written. Correct?

3 A. That's correct.

4 Q. And -- or people perform the music that songwriters write.
5 Correct?

6 A. Yes.

7 Q. And then other people may record those performances that
8 other people perform of songs that the songwriters --

9 A. Uh-huh.

10 THE COURT: You need to answer yes or no.

11 THE WITNESS: Oh, yes. I'm sorry.

12 THE COURT: The record will reflect your answer.

13 BY MR. BRIDGES:

14 Q. And there is a separate, different copyright in the sound
15 recording of that performance. Correct?

16 A. That's correct. There's a song recording copyright.
17 That's correct.

18 Q. And this case is not about any sound recording copyrights.
19 Correct?

20 A. That is my understanding.

21 Q. Okay. I'd like to look at exhibit -- the exhibit you've
22 provided. Mr. Allan took you through it, and I'll ask you to
23 do a couple of things.

24 So what's -- what -- how did BMG determine what songs
25 to include in this list?

1 A. I'm sure our copyright department provided that
2 information.

3 Q. Do you know on what basis?

4 A. Ownership and its every agreement that we have with our
5 songwriter leads to a copyright registration.

6 Q. But do you know why these songs and not other songs?

7 A. Those are the copyrights that matter in this particular
8 situation.

9 Q. Do you know why these songs matter in this situation and
10 not others?

11 A. Because notices have been sent with respect to
12 infringement about those songs on the Cox network. That's my
13 understanding.

14 Q. Do you understand also that there were many millions of
15 notices sent about many more songs than are on this list?

16 A. I do.

17 Q. But this suit is only about these songs. Correct?

18 A. That's my understanding.

19 Q. And you understand that over the course of this case, over
20 a hundred songs have dropped off the list?

21 A. That's my understanding also.

22 Q. Why?

23 MR. ALLAN: Objection, Your Honor. What's the
24 relevance of this?

25 THE COURT: Sustained.

1 BY MR. BRIDGES:

2 Q. Mr. Hubert, let me ask you to look again at the headings
3 of this document.

4 What do you understand the type of copyright to be in
5 the numbers of the U.S. copyright registration numbers on the
6 left?

7 A. Again, as I said, I'm not a copyright expert.

8 Q. Do you know whether that is a copyright in the musical
9 composition or in the sound recording or in -- excuse me --
10 that's right -- or in the sound recording?

11 A. I do not know.

12 Q. You don't know.

13 And the song title here would be both the title of a
14 musical composition and the title of a different copyrighted
15 work, mainly the sound recording of a performance of that
16 musical composition. Correct?

17 A. To my understanding, it would be a musical composition, a
18 song. That's my understanding.

19 Q. Well, when somebody records the song, they usually release
20 the song under the same title as the musical composition.

21 A. That's correct, but that's a song recording copyright.

22 Q. Okay. Do you happen to know whether the PA numbers refer
23 to musical compositions whereas SR numbers refer to sound
24 recordings and copyright registrations?

25 A. I believe it is to the composition, but I'm not entirely

1 sure.

2 Q. And then on the next -- on the column over towards the
3 right under recording artist, those are people who happen to
4 sing or otherwise perform the compositions for some other
5 recording -- excuse me -- for some recorded performance.

6 Correct?

7 A. Yes.

8 Q. And that -- when the recording artist performs a song and
9 that song -- that performance is recorded, that's a separate
10 copyright in that sound performance -- in that sound recording
11 you mentioned. Correct?

12 A. Could be, yes.

13 Q. And that would have a separate copyright registration.
14 Correct?

15 A. As I said, I'm not a copyright expert.

16 Q. Okay. Well, let me ask you to look -- if we could go down
17 to line 34, please.

18 A. Should I do it myself or should --

19 Q. Oh, I think we'll get it blown up. Just want to give an
20 example. This is a -- sorry -- are you familiar with this
21 song, Mr. Hubert?

22 A. I know this song. I could not sing it, but I know this
23 song.

24 (LAUGHTER.)

25 Q. So this was a musical composition called You Don't Love Me

1 Anymore, which the songwriters of the musical composition are
2 Gregory Barnhill and Kim Carnes. Correct?

3 A. That is correct.

4 Q. And Tim McGraw wasn't a songwriter of that song. Correct?

5 A. Can you repeat your question, please?

6 Q. You see the name Tim McGraw over towards the right?

7 A. It doesn't look like he has any writer credit.

8 It doesn't look like he has any writer credit on that
9 song, that's correct.

10 Q. No writer credit.

11 A. Yes, I'm sorry. No writer credit.

12 Q. Okay.

13 So he's simply a performer on a different copyright
14 for the sound recording. Correct?

15 A. That is correct.

16 Q. I've got a few other questions just to help me understand
17 these.

18 A. Sure.

19 Q. If we could look down to lines 490 to 499 -- sorry -- yes,
20 490 to 499.

21 Can you see that blown up?

22 A. Yes.

23 Q. I notice that all of these songs have the same copyright
24 registration number.

25 A. Yes.

1 Q. Do you know why that's the case?

2 A. They are part of the same album.

3 Q. Part of the same album?

4 A. I suspect it is the case, yes.

5 Q. In other words, these are all musical compositions that
6 are gathered together in a group --

7 A. That is correct.

8 Q. -- published together as a group. Correct?

9 A. That is correct.

10 Q. Is there another technical term in the industry for a
11 group of songs together like that?

12 A. Not particularly.

13 Q. Have you heard the term "compilation"?

14 A. Oh.

15 MR. ALLAN: It's an album.

16 THE WITNESS: Yes, it's an album.

17 BY MR. BRIDGES:

18 Q. It's an album, but it's also what you know in the industry
19 as a compilation. Is that correct?

20 A. Again, I'm not -- personally, I haven't heard compilations
21 in many other context, but I'm not a copyright expert.

22 Q. But these are musical compositions that were published
23 together and registered together as a single unit. Correct?

24 A. That is correct.

25 Q. And let's look down at -- or look up, please, at line 454.

1 There is an entry for American Honey. What can you tell me
2 about that song?

3 A. I'm not sure I understand your question.

4 Q. What do you know about the song, American Honey?

5 A. I know the title.

6 Q. Do you know who performed it?

7 A. I do know the band, Lady -- Lady Antebellum.

8 Q. And do you know who -- and so when Lady Antebellum
9 performed the song and that was recorded, that's a separate
10 copyright not here for sound recording. Correct?

11 A. The sound recording is a separate copyright, yes.

12 MR. ALLAN: Your Honor, I object. There are no sound
13 recording copyrights in the case. We're getting outside --

14 MR. BRIDGES: I'll be able to tie this together
15 later, Your Honor.

16 THE COURT: Well, you -- this is multiple examples
17 of -- we're asking the same questions over and over again, so
18 let's keep it to a few versus a lot, please.

19 MR. BRIDGES: I'm sorry I didn't make the difference
20 clear over that.

21 BY MR BRIDGES:

22 Q. What I'm -- and so if we look at this song, do you know
23 how many copyright registrations there are for the song,
24 American Honey?

25 A. I do not know.

1 Q. Do you know that there are two different registrations for
2 the musical recording?

3 A. I know there's a registration for the composition on the
4 publishing side, and I suspect there's a registration on the
5 sound recording as well.

6 Q. Do you know there are two registrations for the sound
7 recording?

8 A. I do not know. As I said, I'm not a copyright expert.

9 Q. Do you know what names are credited on the copyright
10 registration for American Honey as shown in this number,
11 registration number?

12 A. I do not know.

13 Q. Do you know that that registration doesn't show any
14 reference to Lady Antebellum on it?

15 A. I do not know.

16 Q. And do you know that there are two registrations for sound
17 recordings, one of which the owner is Capitol Records
18 identifying Lady Antebellum with a song, American Honey?

19 A. I suspect that's the case, yes.

20 MR. ALLAN: Your Honor, I object again. He's trying
21 to make a point about the sound recording copyright.

22 MR. BRIDGES: Your Honor --

23 THE COURT: And I'm going to let him attempt to tie
24 it up. I don't understand the relevance either, Mr. Allan, but
25 we'll give him the opportunity to demonstrate its relevance.

1 BY MR. BRIDGES:

2 Q. Lady Antebellum's American Honey is a sound recording.

3 Correct?

4 A. Yes, I believe it is.

5 Q. Thank you.

6 I'd like to ask you a little about the Rightscorp
7 relationship that you discussed earlier. Do you recall when
8 you signed the representation agreement with Rightscorp?

9 A. I believe it was in 2011.

10 MR. BRIDGES: Your Honor, may I offer the witness a
11 copy of the Rightscorp agreement?

12 THE COURT: Yes. Go ahead.

13 BY MR. BRIDGES:

14 Q. Mr. Hubert, do you recognize this document, which is
15 marked as Defendant's Exhibit 0248?

16 A. Yes.

17 Q. It appears to be an e-mail from Keith Hauprich of BMG to
18 Rightscorp, then with a reply from Christopher Zabek at
19 Rightscorp back to Mr. Hauprich attaching a fully executed
20 representation agreement. Is that correct?

21 A. Do you want me to look at the first e-mail that I have?

22 Q. Take your time.

23 A. Yes.

24 Q. And Rightscorp returned this executed agreement to BMG
25 apparently on June 27th, 2013. Is that your understanding?

1 A. That's what I can see here.

2 Q. Did you read the agreement when BMG entered into it?

3 A. No.

4 Q. You did not?

5 A. I did not.

6 Q. How did you know to sign it?

7 A. Excuse me?

8 Q. How did you know to sign it?

9 A. I sign agreements every day. You know, I'm involved in a
10 lot of activities for business.

11 Q. What -- who asked you to sign it?

12 A. I don't recall exactly, but typically I have my assistant
13 that provides me with a binder at the end of the day with a
14 number of documents to sign. That's when I signed those
15 documents.

16 Q. But you sign legal agreements like this without reading
17 them?

18 THE COURT: That's not his testimony, Mr. Bridges.
19 Rephrase the question.

20 BY MR. BRIDGES:

21 Q. Were you aware that this agreement contemplated in
22 paragraph 5 settlement collection for license infringements of
23 BMG's rights of \$20 for each alleged infringement?

24 A. At what time?

25 Q. At the time of the agreement.

1 A. At the time of signing the agreement?

2 Q. Yes.

3 A. No, I wasn't.

4 Q. I direct your attention to -- did you have some other
5 understanding?

6 A. No, I signed the agreement and that's all.

7 Q. Did you know what the settlement price structure was that
8 Rightscorp was going to use on BMG's behalf?

9 A. At what point in time?

10 Q. At the time that this agreement went into effect.

11 A. No.

12 Q. Did you ever?

13 A. Only recently in the context of preparing for the trial.

14 MR. BRIDGES: Your Honor, I would like to offer that
15 into evidence, please.

16 THE COURT: Any objection?

17 MR. ALLAN: No, Your Honor.

18 THE COURT: All right. It's received.

19 For the record, it's Defense Exhibit 248.

20 BY MR. BRIDGES:

21 Q. Mr. Hubert, you mentioned that BMG does not authorize
22 songs on BitTorrent. Correct?

23 A. That is correct, to my knowledge.

24 Q. Are you familiar with a band called Gramatik?

25 A. I became familiar with the band, yes.

1 Q. How did you become familiar with it?

2 A. Again, in the context of preparing for this trial.

3 Q. And is it because you became aware that -- and what is
4 BMG's relationship with Gramatik?

5 A. To my knowledge, none.

6 Q. None?

7 A. No relationship.

8 Q. All right. Does BMG have a relationship with songwriters
9 who have written songs that Gramatik has performed?

10 A. My understanding is that this sampled a work that we
11 control and Muddy Waters work that we control. That's my
12 understanding.

13 Q. I'm sorry. I didn't hear the last --

14 A. I'm sorry. My understanding is that they sampled a work
15 that we control by Muddy Waters.

16 Q. Okay. Do you understand that Gramatik put its music out
17 on BitTorrent for its fans?

18 A. I recently understood that.

19 Q. Did you understand that that was a -- that was a song that
20 Rightscorp enforced on BMG's behalf until Rightscorp learned
21 that Gramatik had itself put its own performance of that song
22 out on BitTorrent?

23 A. That is my understanding.

24 Q. Were you aware of the full authority that BMG gave
25 Rightscorp?

1 A. Not in great details.

2 Q. Who knows most of the details at BMG?

3 A. Well, this was an initiative within our legal business
4 affair department and/or staff within that department. And
5 Keith Hauprich specifically knew the details.

6 Q. Keith Hauprich, the deputy general counsel?

7 A. That is correct.

8 Q. What actions on BMG's behalf did you understand Rightscorp
9 to be authorized to take?

10 A. My understanding is that they could detect infringement on
11 an ISP network and they would send those notices to the various
12 ISPs.

13 Q. And what else?

14 A. That was my understanding, that they would try to settle
15 the matter and resolve the matter as best as we can with the
16 user.

17 Q. Did you understand that Rightscorp had authority to
18 negotiate settlements and collect money on BMG's behalf?

19 A. Not in great details, but I -- there was -- that was what
20 was implied.

21 Q. Did you understand that Rightscorp had the authority to
22 demand termination of Internet service to subscribers by ISPs
23 on BMG's behalf?

24 A. I don't believe they were demanding to the subscribers. I
25 believe those were directed to Cox, but not to the subscriber.

1 Q. Perhaps I misspoke. I'm sorry.

2 Are you aware that -- strike that.

3 To your knowledge, did BMG authorize Rightscorp to
4 ask ISPs to terminate Internet service to subscribers based on
5 alleged violations of BMG's copyrights?

6 A. I was aware that this could be one of the options in one
7 of the ISPs. That's correct.

8 Q. Did you understand BMG to authorize Rightscorp to collect
9 evidence of infringements against subscribers?

10 A. Yes.

11 Q. Did you understand that BMG authorized Rightscorp, among
12 other things, to at any point download songs from Cox
13 subscribers in order to collect evidence?

14 A. I -- you know, Rightscorp is a third-party supplier for
15 us. I did not understand all the details of those processes.
16 So the answer is no.

17 Q. What investigations did, to your knowledge, BMG do into
18 write the details of Rightscorp's processes?

19 A. We haven't, to my knowledge.

20 Q. Do you know when Rightscorp started looking for
21 infringements of BMG's songs?

22 A. I don't have an exact timeline other than to know that we
23 signed the agreement in December 2011. And I suspect that they
24 have started to work on the infringements of the songs.

25 Q. In fact, Keith Hauprich, the deputy general counsel,

1 negotiated the deal with Rightscorp. Correct?

2 A. Yes, he did.

3 Q. And he recommended to you that BMG enter into the contract
4 with Rightscorp?

5 A. Yes, he did.

6 Q. And he supervised the relationship with Rightscorp?

7 A. Yes, he did.

8 Q. And he reviewed documents that Rightscorp sent on BMG's
9 behalf?

10 A. I believe he did.

11 Q. Did you ever see the notices that Rightscorp sent out on
12 BMG's behalf?

13 A. I have seen some notices recently as part of the
14 preparation for this trial.

15 Q. But beforehand you had not?

16 A. I don't recall.

17 Q. Do you recall -- strike that.

18 Did BMG know that before Rightscorp entered into the
19 agreement with BMG that Cox had told Rightscorp that it would
20 not accept or process Rightscorp's notices that had monetary
21 demands?

22 A. Can you repeat your question, please?

23 Q. Did you know -- strike that.

24 A. Did you know -- yeah.

25 Q. Did you know before entering into the relationship with

1 Rightscorp --

2 A. Uh-huh.

3 Q. -- that Cox had told Rightscorp previously that it would
4 not accept notices from Rightscorp that had demands for payment
5 of money?

6 A. No.

7 Q. When did you find out?

8 A. I don't recall exactly.

9 Q. Do you know when BMG found out? Have you heard?

10 A. I don't know.

11 Q. Did you ever know that Cox had said to Rightscorp that if
12 you take the monetary demands out of notices we will forward
13 them?

14 A. I became aware of this recently again in preparing for
15 this trial, but it was very unclear as to what right Cox would
16 do, not as other than to say they would process those notices.
17 I have no question what that means.

18 Q. What did you do to find out what that meant?

19 A. Personally, I haven't done anything. As I said, I just
20 learned this in the context of this trial.

21 Q. Now, you referred earlier to a BitTorrent website. Are
22 you familiar with BitTorrent websites?

23 A. There are a number of BitTorrent websites, yes.

24 Q. Are you aware that no Rightscorp notice to Cox ever
25 identified any website hosted by Cox?

1 A. I believe they identify a file as being uploaded on a
2 BitTorrent protocol, data protocol.

3 Q. But not a BitTorrent website like The Pirate Bay or
4 Kickass Torrents or something like that. Correct?

5 A. I would not know the details, to be honest with you.

6 Q. Do you know how many notices BMG sent out through
7 Rightscorp?

8 A. I believe it is in the millions.

9 Q. Do you know how many millions?

10 A. I believe it's -- I don't have an exact number, but I
11 believe it's north of five million. That's what I understand.

12 Q. Are you talking about just to Cox or to all ISP
13 subscribers?

14 A. I don't recall.

15 Q. Let me ask you, just to make the record clear. Do you
16 know how many notices Rightscorp has sent out to all ISP
17 subscribers?

18 A. I don't have an exact number, but I do believe it's in the
19 millions.

20 Q. Do you know how many IP addresses BMG has targeted through
21 Rightscorp?

22 A. I do not know.

23 Q. Do you know how many subscribers of ISP services broadly
24 BMG has asked Internet providers to terminate?

25 MR. ALLAN: Objection --

1 THE WITNESS: I don't --

2 MR. ALLAN: -- Your Honor. It's outside the scope of
3 some of our rulings.

4 THE COURT: What was the question again?

5 MR. BRIDGES: I asked, does he know how many requests
6 for termination of subscribers broadly BMG sent out through
7 Rightscorp.

8 THE COURT: I'll allow that. And he said he doesn't
9 know, so --

10 MR. ALLAN: Your Honor, it was to other ISPs.

11 MR. BRIDGES: To all ISPs.

12 THE COURT: All ISPs. All right. That's sustained.
13 He's already said "I don't know" to all of your questions, so
14 he clearly does not know how many notices were sent out to
15 anybody. So let's -- you've proven your point, if there was a
16 point to prove, and let's move on.

17 THE WITNESS: I'm not involved in --

18 MR. ALLAN: There's no question pending.

19 BY MR. BRIDGES:

20 Q. BMG Rights Management -- the plaintiff is BMG Rights
21 Management U.S., LLC. Correct?

22 A. That is correct.

23 Q. But BMG Rights Management operates as a sort of U.S. and
24 German company. Correct?

25 A. It's a U.S. operation.

1 Q. All right. Does it work with a German parallel company?

2 A. We have a parent company.

3 Q. But is there a sister company in Germany?

4 A. It's a parent company.

5 Q. And are some of the BitTorrent websites that cause BMG
6 concern located in Europe?

7 A. Some are.

8 MR. BRIDGES: No further questions. Thank you.

9 THE COURT: Redirect, Mr. Allan.

10 MR. ALLAN: Thank you, Your Honor. Couple of quick
11 questions.

12 THE COURT: Sure.

13 REDIRECT EXAMINATION

14 BY MR. ALLAN:

15 Q. Mr. Hubert, first of all, in terms of the copyrights that
16 BMG owns that Mr. Bridges talked to you about, does the
17 songwriter still receive a significant share of the revenue
18 that is generated based on the copyrights that BMG owns?

19 A. The vast --

20 MR. BRIDGES: Objection.

21 THE COURT: Overruled.

22 THE WITNESS: The vast majority, yes.

23 BY MR. ALLAN:

24 Q. And on what percentage basis? The same percentage you
25 talked about earlier?

1 A. Anywhere between 75 and 95 percent.

2 Q. We have heard a lot about --

3 THE COURT: Let's try not to lead.

4 MR. ALLAN: Thank you, Your Honor. I will.

5 BY MR. ALLAN:

6 Q. In terms of musical compositions and recorded songs, what
7 is the relationship between musical composition and sound
8 recordings?

9 A. Well, a song -- when a song is written, it leads to a
10 music composition. When that music composition is recorded, it
11 leads to a recorded music master.

12 Q. So there may be a separate copyright for it?

13 A. It is a separate copyright.

14 Q. And if the musical composition copyright is infringed,
15 does that also mean the sound recording is also infringed?

16 A. Yes.

17 Q. So if there's an infringement taking place on the Cox
18 network, would that encompass infringement of more than the
19 sound of the composition copyright?

20 A. Absolutely.

21 Q. I think Mr. Bridges showed you an example of a Kings of
22 Leon album?

23 A. Yes.

24 Q. Do you recall that?

25 And there were a number of works that were shown of

1 one copyright registration.

2 A. Uh-huh.

3 Q. Do you consider those to be each individual copyrighted
4 works?

5 A. I do.

6 THE COURT: You're leading again. Ask him whether or
7 not he --

8 MR. ALLAN: Okay. I apologize, Your Honor.

9 THE COURT: All right.

10 MR. ALLAN: Can I show DTX 0248? Can you bring that
11 up?

12 THE COURT: You may still have it in hard copies, the
13 contract with the e-mails in front, if you want to look at it
14 in hard copy.

15 MR. ALLAN: Thank you, Your Honor.

16 BY MR. ALLAN:

17 Q. This is the representation agreement you were showed --

18 A. Oh, okay.

19 Q. -- earlier.

20 A. The agreement?

21 Q. Yes. Just to make sure I understand, what was your
22 understanding of the settlement component of the Rightscorp
23 arrangement with BMG?

24 A. The understanding of the settlement itself, the language
25 of the settlement or --

1 Q. Just the -- did you have a broad understanding of the
2 settlement language? And if so, what was it?

3 A. I had an understanding that the goal was to, again,
4 educate the infringer and find a reasonable solution to resolve
5 the claim and infringement by asking a modest amount of money,
6 anywhere between 20 and \$30. That was my understanding.

7 Q. And was that your understanding when the relationship
8 began with Rightscorp?

9 A. Generally speaking, yes. High level.

10 Q. Mr. Bridges talked to you about Gramatik. Could you
11 explain, again, the relationship between BMG and Gramatik?

12 A. Gramatik, again, sampled a work that we control, but we
13 don't control Gramatik. We do control the work that is sampled
14 in the composition.

15 Q. And what is your understanding of what BMG did with
16 respect to enforcement of that work when it learned Gramatik
17 wanted that particular work on BitTorrent?

18 A. Well, I understand that Gramatik contacted us and then we
19 communicated to Rightscorp that that could be removed from the
20 system at their request.

21 Q. Are you aware of any other examples where songwriters of
22 BMG have asked to have their music put on BitTorrent?

23 A. I personally don't.

24 Q. And finally, Mr. Bridges asked you about the concept that
25 communication with Cox and Rightscorp about the settlement

1 language. Do you recall that?

2 A. Yes.

3 Q. Do you know what Cox would have done in terms of
4 processing the notices in Cox speak?

5 THE COURT: That calls for speculation, I believe,
6 unless you lay a foundation.

7 MR. ALLAN: Well, he was asked, Your Honor, about the
8 question. I just want to know if he knows what Cox would have
9 done in terms of what processing meant.

10 THE COURT: Based on what? Based on conversation
11 with Cox or --

12 MR. ALLAN: Well, based on any communications with
13 Rightscorp or their agent.

14 THE COURT: What Cox -- what was his answer to the
15 question that was asked in cross-examination, was I don't know.
16 Right?

17 MR. ALLAN: And I'm just -- I'm wondering if he knew
18 what process meant. That was my only question, Your Honor.

19 THE COURT: What is his understanding --

20 MR. ALLAN: Yes.

21 THE COURT: -- of what process means.

22 You may answer that question, sir.

23 THE WITNESS: I don't. I don't know what process
24 means.

25 MR. ALLAN: Thank you. Nothing further.

1 THE COURT: All right. May this witness be excused
2 or do you want him subject to recall?

3 MR. ALLAN: We will have him subject to recall.

4 THE COURT: All right.

5 Mr. Hubert, thank you. Your testimony is complete
6 for tonight, but you may be subject to recall. Please don't
7 discuss the testimony you've given here today with anyone else
8 except your counsel. And you're going to have to remain
9 available for further testimony perhaps in a later stage of the
10 case. All right, sir?

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: All right. Thank you.

13 MR. ALLAN: Thank you, Your Honor.

14 MR. BRIDGES: Thank you.

15 THE COURT: Next witness.

16 MR. ALLAN: Your Honor, we call -- plaintiffs call
17 Barbara Frederiksen-Cross.

18 MR. BUCKLEY: Your Honor --

19 THE COURT: And this is where you had an issue.
20 Let's go to the side-bar.

21 I apologize in advance for this horrible sound. And
22 we'll keep sidebars to a minimum. And I've asked them to play
23 music or do something else, but they refuse. And instead
24 you'll be assaulted in a moment here, and I apologize.

25 (ON-THE-RECORD BENCH CONFERENCE, TO WIT:

1 THE COURT: Okay. So let me first start with
2 Mr. Bridges. You have asked about the hundred copyrights that
3 were no longer part of the case. And that was Round Hill?

4 MR. BRIDGES: No, no, BMG.

5 THE COURT: It was BMG.

6 MR. BRIDGES: It was off BMG's list.

7 THE COURT: All right. I didn't think it was
8 relevant, but it doesn't violate my -- our ruling that Mr.
9 Buckley asked for yesterday.

10 Okay. So what's the -- what's at issue?

11 MR. BUCKLEY: So, Your Honor, the next witness
12 they're going to call is the code expert, Ms.
13 Frederiksen-Cross.

14 THE COURT: Yes.

15 MR. BUCKLEY: And they've got hundreds of slides that
16 they're going to use with her, 50 of which we've objected to on
17 the grounds that they're related to documents that she can't
18 authenticate. She has no foundation to talk about; they're
19 hearsay. There are all sorts of problems with them. And so we
20 can go slide by slide or we can do it during her direct, but
21 the overarching issue, Your Honor, is they're trying to use
22 their expert to basically tell their story and to put on their
23 case and to authenticate documents that other witnesses are in
24 a position to authenticate. So we either do that now with the
25 jury out and go slide by slide and exhibit by exhibit or we can

1 do it on the fly.

2 MR. BRIDGES: I think it's beyond her -- possibly way
3 beyond her --

4 MR. BUCKLEY: Well, outside the scope.

5 THE COURT: And are these going to be authenticated
6 by other witnesses during the trial?

7 MR. BUCKLEY: They should be. They're all documents
8 that somebody else in theory could authenticate if somebody
9 offers them properly.

10 THE COURT: Your response?

11 MR. CARACAPPA: Well, I don't think there's a problem
12 with using our expert to put on our case. That's the first
13 point.

14 Second point is all of those documents that she's
15 talking about will be authenticated by other BMG witnesses
16 during the trial. There's three main categories of documents.
17 There's the notices, there's the code, and then there's the
18 CATS system, which is the system that Cox uses to deal with the
19 notices.

20 THE COURT: Right.

21 MR. CARACAPPA: She dealt with all three of those
22 things in her report. She is in a position, we believe, to lay
23 the foundation for these things. She analyzed the code. She
24 can say what it does. She can say as a result of the code it
25 generates notice X.

1 She's not going to go into a tremendous amount of
2 detail. There are a couple of notices that we're going to go
3 into to show the jury it says Cox, it says the IP address, it
4 says the song work.

5 She also looked at the CATS code. She analyzed it.
6 She knows what it does. So she's going to talk about what
7 happens when a notice comes in from Rightscorp and somebody
8 else, how it goes through this graduated response.

9 I'm going to move through it quickly. We are aware
10 that --

11 THE COURT: Put the case on the way you want to put
12 the case on. Hopefully not so that you kill the jury with the
13 information.

14 MR. CARACAPPA: That's our hope, yes, Your Honor.

15 THE COURT: All right.

16 And why isn't that admissible?

17 MR. BUCKLEY: Well, she can't authenticate any of the
18 documents. Just the fact --

19 THE COURT: The representation is they're going to be
20 authenticated, and every day in a courtroom judges say, okay,
21 you know, I'll provisionally let them in. We won't formally
22 admit them. We'll wait and see what happens, and if there's a
23 problem down the road, we'll cure it.

24 MR. BUCKLEY: So if we can understand their
25 objection, she -- if those documents are authenticated later

1 or --

2 THE COURT: If they're not otherwise admissible,
3 absolutely, I'll give you that standing.

4 MR. BUCKLEY: Okay. And some of the slides go well
5 beyond what we believe she has put in her report, and she's got
6 slides that she made up about how CATS works and that sort of
7 thing. So I'm going to have to object on a slide-by-slide
8 basis to those, so I don't know how you want to handle that.
9 It's about to come up. Do I pop up?

10 THE COURT: So you've seen the slides.

11 MR. BUCKLEY: We've seen these slides.

12 THE COURT: You've looked at them. And were they
13 subject to her report? You say -- Mr. Buckley says they're
14 outside of the report. And if they're summaries, that's one
15 thing. If they contain new information that she did not make
16 available so that it could be subject to questions, then I
17 think it's inadmissible.

18 MR. CARACAPPA: We believe they were set forth either
19 in her report or at her deposition. So we believe everything
20 in the slides is within the scope of her --

21 THE COURT: When you say in the deposition --

22 MR. CARACAPPA: It could have been --

23 THE COURT: -- the physical exhibit was shown or the
24 information in the exhibit was the subject of the deposition?

25 MR. CARACAPPA: The information in the exhibit was

1 discussed in the deposition. I think it's all in the report.
2 There may be one slide that was discussed in her deposition,
3 so --

4 THE COURT: So did you supplement the report to -- to
5 reflect the additional testimony she gave in the deposition?

6 MR. CARACAPPA: She did submit a supplemental report,
7 so there are two reports. There's a declaration that she
8 submitted as well.

9 MR. BUCKLEY: She was --

10 MR. CARACAPPA: If there's a -- maybe tonight we can
11 talk about a particular document, because we're not going to be
12 able to get through Ms. Cross today. So maybe tonight. And I
13 think most of this stuff is at the end, so maybe tonight we can
14 talk about what we think is within or without the scope of the
15 report.

16 THE COURT: All right. Let's try that way. And if
17 we need to start the morning talking about that, that's what
18 we'll do.

19 All right. Thank you.

20 MR. CARACAPPA: Thank you, Your Honor.

21 VOICES: Thank you, Your Honor.

22 (END OF BENCH CONFERENCE.)

23 THE COURT: Is our witness in the courtroom or is she
24 still outside?

25 MR. CARACAPPA: She is, Your Honor.

1 THE COURT: Oh, please come forward.

2 COURT SECURITY OFFICER: Face the clerk, please.

3 (THE OATH WAS ADMINISTERED.)

4 THE COURT: Go ahead.

5 MR. CARACAPPA: Good afternoon, Your Honor. John
6 Caracappa on behalf of plaintiff, BMG.

7 BARBARA ANN FREDERIKSEN-CROSS

8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. CARACAPPA:

11 Q. Good afternoon.

12 A. Good afternoon, counsel.

13 Q. Can you please state your full name for the record?

14 A. My name is Barbara Ann Frederiksen-Cross. And that is
15 Barbara spelled B-A-R-B-A-R-A, Frederiksen,
16 F-R-E-D-E-R-I-K-S-E-N, and then hyphen, C-R-O-S-S.

17 Q. And could you please tell the Court a little bit about
18 your educational background?

19 A. Yeah. I was one of those classic kids who got interested
20 in computers about the age of 13 in a math class - it would
21 have been called a stem class today - where I got exposure to
22 programming. And after getting my first taste of programming,
23 I got very excited about becoming a programmer when I grew up.
24 And I went to a local community college where I finished my
25 high school degree and entered into a program to learn computer

1 programming.

2 So I got my first job in computer programming at
3 about 18 after completing a two-year degree in programming, and
4 that was in 1974. Since then I've been continuously employed
5 in the computing industry, and I received a lot of training
6 from companies within that industry like IBM and the SASS
7 Institute, the Merrell Institute, Verhoef, Microsoft,
8 DevelopMentor, and other companies that specialize either in
9 computer technology and they offer training about that
10 technology or they have specific services to provide training
11 about technology. And that would be companies, like
12 DevelopMentor, that teach languages, computer languages.

13 Q. Thank you, Ms. Frederiksen-Cross.

14 Could you please describe your experience in computer
15 programming?

16 A. As I said, it started when I was about 13 or 14. I have
17 been writing computer programs continuously since then, so
18 about 42 years. 42 years for pay and a couple of years before
19 that before I was old enough to do it for pay.

20 THE REPORTER: Can I ask you to slow down just a
21 little bit?

22 THE WITNESS: Sure, sure. Thank you.

23 I started out in the early days working for big
24 companies because in the 1970s that's who had computers. So I
25 worked for government agencies, I worked for banks, I worked

1 for telephone companies, I worked for insurance companies, and
2 I worked for a few large manufacturing companies that were big
3 enough to have sophisticated computer systems. And, again,
4 during that time I was getting training from IBM and others who
5 provided those systems.

6 When I was about 21, I started a business on my own
7 specializing in high-performance systems and in fixing problems
8 with those systems that were related to their performance or
9 scalability. So a bank might have a system and it was starting
10 to bog down because now there were more checking accounts and
11 they couldn't keep up. My specialty was to go in and to figure
12 out what could be done to improve that performance and to make
13 it right.

14 BY MR. CARACAPPA:

15 Q. Did you ever do any work for any police departments?

16 A. I did. For about nine years, I was a police reserve
17 recruit, and basically I functioned in a capacity where I was a
18 volunteer advisor to the Hillsboro High-Tech Crime Team. My
19 role when I worked for them was to assist in policies and
20 procedures involving the handling of electronic data or
21 computer-based investigations. I assisted in things like
22 fraud, investigations, and missing persons where they needed
23 someone who could look at evidence to find out what had gone on
24 and was there evidence on a computer that related to some kind
25 of criminal activity.

1 Q. And what would you say is your profession?

2 A. Since 1997, the focus of my profession has been forensic
3 software analysis, and that is the analysis of computer
4 programs and computer controlled devices and generally computer
5 data. So that can run the gamut from cases like this that
6 might involve some aspect of how computer programs operate, to
7 cases that might involve something like computer fraud on the
8 Internet or intrusion into protected systems.

9 Q. And how many matters involving forensic software analysis
10 would you say you've done since 1997?

11 A. If I could answer that question slightly differently
12 because I started doing forensics in 1986, approximately '86,
13 '85, '86. And the counts I've got in my head are really for
14 the total of the period of time I've been doing forensics. And
15 that's between 225 and 250 cases.

16 Q. And have you published any articles in your field?

17 A. I have published articles both in technical forum and also
18 in legal symposia relating to computer forensics and the
19 handling of digital evidence.

20 Q. Are you a member of any professional organizations?

21 A. I am a member of ACM, which used to be the Association of
22 Computing Machinery. It's an educational, nonprofit
23 organization, one of the world's largest educators and
24 publishers of information related specifically to the computer
25 industry. And I'm also a member of the IEEE.

1 Q. Ms. Frederiksen-Cross, what is source code?

2 A. Source code is the human readable form of a computer
3 program. So it's what a programmer would write in order to set
4 down the instructions to tell a computer how to solve some
5 particular problem. And that term is used in contrast to
6 binary code or executable code, which is the form of that
7 program the human wrote when translated that's run on a
8 computer. So the binary form is what the computer reads; the
9 source code is what I would read typically.

10 Q. And what language is the source code at issue in this case
11 written in?

12 A. Most of the source code with respect to the Rightscorp
13 code is written in the Java language, and then there's some
14 components that are written in what's called JSP, which is a
15 language used for a web-based systems.

16 Q. And can you please describe for the jury the experience
17 you have in Java code and script languages?

18 A. Sure. I've been writing Java code almost since the
19 language came into being in the marketplace. I received my
20 formal training in Java from a company called DevelopMentor.
21 DevelopMentor is the same company that Microsoft uses for a lot
22 of its internal trainings. I have done pretty extensive Java
23 development myself, much of it in the context of robotics,
24 which is one of my hobbies in an area that I'm sort of pursuing
25 as I move towards retirement.

1 I'm working on some inventions in that area that
2 relate to robots to be used in agricultural applications. And
3 I've also done extensive analysis of Java code in the context
4 of various litigation matters including copyright matters,
5 patent matters, and trade secret matters.

6 Q. How many lines of Java code would you say you've analyzed
7 in your career as a computer forensic specialist?

8 A. Somewhere between very high hundreds of millions and very
9 low billions probably.

10 Q. And how many lines of code have you written in those
11 languages?

12 A. Boy. Hundreds of thousands at least, if not more.

13 Q. Ms. Frederiksen-Cross, who do you currently work for?

14 A. I have my own company, Frederiksen Software, Incorporated.
15 And I also work as the senior managing consultant and I'm on
16 the board of directors for a company called Johnson-Laird
17 Incorporated, or JLI. JLI was one of the early pioneers in
18 digital forensics.

19 Q. And what do you do at JLI?

20 A. Primarily forensic analysis in the context of cases like
21 this. But I'm also involved in some of our staffing,
22 recruiting, training, and some of our decisions about our own
23 internal technologies that we want to use within -- within our
24 business.

25 MR. CARACAPPA: Your Honor, I have a witness binder

1 for Ms. Frederiksen-Cross.

2 THE COURT: Sure.

3 MR. CARACAPPA: We have one for the Court as well,
4 Your Honor.

5 THE COURT: All right. Thank you.

6 BY MR. CARACAPPA:

7 Q. Ms. Frederiksen-Cross, can you turn to Exhibits PX 1669.

8 A. Okay. I'm there with you.

9 Q. And what is that document?

10 A. This was Exhibit A to a report that I prepared in this
11 matter, and that would be my resume or curriculum vitae as it's
12 called in the legal circles.

13 Q. I'm sorry. And to the best of your knowledge, is it fair
14 and accurate?

15 A. Give me just a half a sec. Just checking to see if it's
16 current.

17 It's accurate, though it appears to be missing a
18 couple of my most recent deposition testimony.

19 MR. CARACAPPA: Your Honor, at this time we would
20 like to move into evidence PX 1669.

21 THE COURT: Objection?

22 MR. BUCKLEY: No objection, Your Honor.

23 THE COURT: All right. It's received.

24 MR. CARACAPPA: We would also like to credit
25 Ms. Frederiksen-Cross as an expert in computer programming and

1 computer forensics.

2 THE COURT: All right. Any objection?

3 MR. BUCKLEY: No, Your Honor.

4 THE COURT: All right. She'll be received for those
5 purposes.

6 MR. CARACAPPA: Okay. Thank you.

7 BY MR. CARACAPPA:

8 Q. Ms. Frederiksen-Cross, what were you asked to do in this
9 case?

10 A. My role in this case has been primarily focused on the
11 software at issue both for Rightscorp's software, the software
12 that's used to detect infringement and to report on that
13 infringement. I was also asked to examine the software that
14 Cox uses for an automated system that they use to -- to handle
15 complaints about -- specifically the complaints about copyright
16 infringements.

17 Q. And can you give the jury a brief summary of your
18 conclusions based on your assessment of the Rightscorp source
19 code, please?

20 A. Yes. I've had the opportunity to examine the source code
21 and to discuss the source code with Rightscorp people who
22 designed the code and wrote the code. Based on the combination
23 of those two things, as well as some testing I have myself
24 performed related to that code, it's my conclusion that the
25 code is a sound approach to detecting infringement. That the

1 code works and is capable of detecting individuals who are
2 trade -- or detecting specific IP addresses where computers are
3 trading files using the BitTorrent protocol. It's capable of
4 collecting actual music samples related to that activity, and
5 it's capable of providing reports, including infringement
6 notices for the activity that it's detected.

7 Q. Do you recall approximately how many asserted works there
8 are in this case?

9 A. About 1,400.

10 Q. And do you recall approximately when Rightscorp started
11 sending notices to Cox on behalf of BMG for the asserted
12 works -- strike that.

13 For the infringement of the asserted works?

14 MR. BUCKLEY: Objection, Your Honor, foundation,
15 assumes facts.

16 THE COURT: Ask her whether she's reviewed them and
17 when she understands they began. So sustain that. Lay the
18 foundation.

19 MR. CARACAPPA: Thank you, Your Honor.

20 BY MR. CARACAPPA:

21 Q. Have you reviewed the notices that Rightscorp sent to Cox?

22 A. I have reviewed selections of them, yes, and I've also
23 done things like use a little program I wrote to pull the dates
24 out of notices and to pull the dates out of some of the data
25 that I was provided that's underlying those infringement

1 notices. So it's actually the data that gets stored from which
2 the infringement notices are written.

3 Q. And based on your review of those notices, do you have an
4 understanding as to when Rightscorp, on behalf of BMG, began
5 sending those notices to Cox?

6 A. About --

7 MR. BUCKLEY: Same objection.

8 THE COURT: Overruled if she says yes.

9 THE WITNESS: About February of 2012, first week of
10 February, Groundhog's Day or February 4th, right in that time
11 period.

12 BY MR. CARACAPPA:

13 Q. Upon your review of the evidence and the code and the
14 notices, do you have an understanding as to approximately the
15 number of notices that have been sent to Cox between February
16 12th -- sorry, February 2nd, 2012, and November 26, 2014?

17 A. Specifically just for the BMG works?

18 Q. Yes, Ms. Frederiksen-Cross.

19 A. About 1.8 million.

20 Q. And what action, if any, has Cox taken with respect to
21 those notices?

22 MR. BUCKLEY: Objection, Your Honor. Foundation.

23 THE COURT: Yeah, no foundation.

24 Sustained.

25 BY MR. CARACAPPA:

1 Q. Do you have an understanding as to what Cox has done with
2 those notices?

3 MR. BUCKLEY: Same objection, Your Honor.

4 THE COURT: Lay a foundation. That's not a
5 foundation. Step -- take a step -- another step back.

6 BY MR. CARACAPPA:

7 Q. Ms. Frederiksen-Cross, have you reviewed the Cox CATS
8 system?

9 A. Yes, I have.

10 Q. And what is the Cox CATS system?

11 A. The Cox CATS system is an automated system that is to say
12 a series of programs that can receive or read from the mail
13 server Cox's facility, e-mails that were sent to Cox as
14 complaints. And it can evaluate those complaints to see what
15 kind of complaint they are. So some might be copyright
16 complaints, for instance, and some might be spam complaints.

17 And then based on the evaluation of what type of
18 complaint it is, and some other information that the programs
19 evaluate, it will parse those complaints, that is to say pull
20 relevant data out of them, and then determine what action is
21 appropriate to take for that complaint. So for instance, in
22 the case of a copyright complaint, it might send an e-mail
23 notice to a subscriber or it might do nothing or it might
24 suspend the subscriber, just depending on, for instance, if
25 it's the first notice they ever received in the last six months

1 for this subscriber or if it's the tenth notice, things like
2 that.

3 So it makes decisions what an appropriate action is
4 to take, and to the extent possible, takes the warning or
5 suspension or ignore actions automatically without requiring a
6 human to read the e-mail.

7 Q. And based on your review of the CATS system, do you have
8 an understanding as to what Cox does with the notices that
9 Rightscorp sends to Cox?

10 THE COURT: Regarding BMG?

11 MR. CARACAPPA: Yes, regarding the asserted works.

12 MR. BUCKLEY: Your Honor?

13 THE COURT: Yes.

14 MR. BUCKLEY: Your Honor, there's no foundation for
15 any of this. This is far outside this witness's knowledge, and
16 there are going to be lots of other witnesses that talk about
17 how CATS operates and also implicates their motions in limine.
18 I think this has gone --

19 THE COURT: Well, number one, just make your
20 objection foundation.

21 Overrule. I'm going to allow the testimony
22 provisionally and at this time. I think she's indicated an
23 understanding of the system, and she's studied the system and
24 may answer the question, if you can.

25 THE WITNESS: Thank you, Your Honor.

1 The code for the Cox system that was provided to me
2 includes both programs and some other configuration data those
3 programs use. One piece of that information is called a black
4 list. And it's a list of e-mail addresses that the system will
5 reject, and that is to say not process. And what the Cox
6 system does for an address that's on the black list is it
7 deletes the e-mail and then takes no further action on it.

8 In the call that I reviewed in the files that I
9 reviewed, the right Rightscorp e-mail that's used when it sends
10 a copyright notice is on that black list. And so what that
11 means is that the e-mail comes into Cox's server, but then the
12 program that goes to read the e-mail off the server reads the
13 header part, the to/from information on the e-mail. It checks
14 it against the black list. It sees that Rightscorp is on the
15 black list, so that e-mail is then just deleted and no further
16 processing occurs for it.

17 BY MR. CARACAPPA:

18 Q. Ms. Frederiksen-Cross, we talked a little bit about this
19 when going over your background, but maybe you can go into a
20 little bit more detail about the materials you've considered in
21 preparing your opinions in this case?

22 A. Oh, certainly.

23 When I was first involved in this case, I received
24 some of the source code for the Rightscorp system. Subsequent
25 to that, I received also some documents related to this case,

1 things like -- there's an exchange of information called
2 interrogatories where each side asks the other questions and
3 then their technical people answer or their business people,
4 depending on the nature of the question, answer those questions
5 and sometimes they attach documents that give the answer. And
6 so I was provided those kind of documents to review as well,
7 the questions that were asked of Cox and of Rightscorp by the
8 opposing parties and the answers that were given.

9 I reviewed the Cox CATS system, which I actually
10 traveled to a Cox facility to review. And then -- or to a
11 facility where they were having the code hosted. And then I
12 reviewed deposition testimony, which is the sworn testimony
13 given by people who are witnesses that you may or may not see
14 on the stand during the course of this trial, but they were
15 witnesses that the parties agreed could be interviewed in this
16 matter. And those were the principal pieces of data.

17 In addition to that then, I also requested and
18 received at various times during my investigation some of the
19 data that the Rightscorp system collects or some of the notices
20 that it sends. You know, I would ask can I see a sample of two
21 weeks' worth of data for a song or can I see a sample of
22 notices or -- you know, at various times I was given different
23 views into the data.

24 And then finally I did some of my own testing of
25 BitTorrent clients and of Rightscorp's ability to detect the

1 activity that I was conducting when I was using BitTorrent
2 to -- in this control test to do testing.

3 THE COURT: Mr. Caracappa, let's end our questioning
4 for tonight. It's 5:30. I promised the jury I would let them
5 go home at 5:30, and I think this is a good time to break in
6 the testimony.

7 So, I'm going to excuse you for tonight. Very, very
8 important that you go home and enjoy yourselves or listen to
9 the news where you'll receive some really horrible news on some
10 California shootings. But don't do any investigation. Don't
11 discuss the testimony or the case with anybody else tonight.
12 Don't do any research.

13 It causes -- it's a complete -- causes a complete
14 breakdown of the judicial system if you don't decide this case
15 based on what you hear in this courtroom and you instead do
16 things on your own to -- to make your decisions. That defeats
17 our whole system. So it's really important that you not do
18 that.

19 The first thing tomorrow I'm going to ask you whether
20 you had adhered to my order, and it's an order. You know,
21 if -- I know you may have read about people who don't listen to
22 the judge -- because every judge gives the same speech I'm
23 giving you -- and have done something to pollute the entire
24 proceeding. It causes mistrials; it costs lots of money,
25 inconveniences. It subjects you to criminal penalties. It's a

1 really serious matter.

2 So, please, go home, enjoy yourselves and your
3 families and some peace, and we'll see you at 9 o'clock
4 tomorrow morning.

5 All right. Thank you. You're excused at this time.
6 (JURY OUT AT 5:30 P.M.)

7 THE COURT: So you're excused for this evening. And
8 as I'm sure you're well aware, you're in the middle of your
9 testimony and you shouldn't discuss the testimony you've given
10 so far with anybody until you return tomorrow. All right?

11 THE WITNESS: (Nods head.)

12 THE COURT: Thank you. And you may step down if you
13 you'd like. I think we have a couple of matters to discuss,
14 nothing I don't think that deals with your testimony. But if
15 you don't want to sit up there versus -- you're released at
16 this time for the night.

17 THE WITNESS: Could I just clarify one thing because
18 I'm not that familiar with local rules here. Am I allowed to
19 talk to counsel about testimony or not?

20 THE COURT: Moving forward, testimony you haven't
21 given.

22 THE WITNESS: Okay. I just wanted to be clear.
23 Thank you, sir.

24 THE COURT: Yeah, absolutely. All right. Have a
25 good evening. Thank you.

1 THE WITNESS: Thank you.

2 THE COURT: All right. Couple -- so let's try and
3 avoid speaking objections. As a judge reminded me, you know,
4 if you're not under oath, you shouldn't be testifying in the
5 courtroom. So I may not get it, and if I don't get it, the
6 nature of the objection, then, you know, I'll ask for help.
7 And I'll ask for more substance, but foundation, hearsay,
8 authentication, you know, those -- that's where we ought to
9 start. And I should have said something before we started
10 trial about that.

11 Mr. Bridges, I'm curious. You asked Mr. Hubert about
12 whether they had a German entity with BMG and then also asked
13 whether BitTorrent wasn't a German company. And I'm just
14 wondering where you're going with that.

15 MR. BRIDGES: Your Honor, he was describing the
16 difficulty of going after overseas websites as part of the
17 rationale for their litigation strategy. Actually have a
18 European parent and there's a lot of litigation in Europe about
19 those European websites.

20 THE COURT: Are you going to have a witness who is
21 going to testify about what the laws are and --

22 MR. BRIDGES: No, Your Honor. That's what I plan to
23 do for now.

24 THE COURT: Okay. Well, that's a little -- that's
25 pretty far out there if you don't have some evidence that --

1 that BMG chose not to go after BitTorrent instead of Cox. And
2 in a foreign -- in a foreign country's laws.

3 MR. BRIDGES: Your Honor, he's said -- he said a
4 strong implication was they couldn't go after foreign websites.

5 THE COURT: Well, he indicated he didn't really have
6 much information about it one way or the other. But let's --
7 unless you're going to develop evidence that, you know, BMG had
8 a legal right to sue BitTorrent in another country and chose
9 not to, then I think we -- we need to forego questions of that
10 nature. I don't think that's relevant to our suit here then.
11 Okay?

12 MR. BRIDGES: Yes, Your Honor.

13 THE COURT: Okay. Now, tomorrow -- or tonight
14 you-all are going to discuss -- see whether you can resolve the
15 exhibits that you plan to use with Mr. --
16 Ms. Frederiksen-Cross, and I thank you for trying to do that.
17 If you can, why don't we, you know, get together at ten minutes
18 to 9:00 or something like that and I'll try give you an answer
19 at that time. My preliminary answer was if they're going to be
20 authenticated down the road, I'm going to allow the testimony.
21 I don't really get in the middle of -- I think it's too
22 formalistic to require all the evidence to be admitted before
23 an expert can testify about it. I just -- we'll rely on the
24 good faith of counsel making the representations, and that's
25 the way it will go for Cox and for BMG.

1 And to the extent you don't think those exhibits can
2 be -- the information in the exhibits can be authenticated or
3 you believe that they're outside of the Rule 26 report or the
4 supplement and you're prejudiced by not having had the ability
5 to depose her about those things, then, I mean, I don't think
6 they're admissible. I think that everybody continues to work
7 with their experts and comes up with all kinds of new ideas
8 that they think, wow, this is -- you know, let's add this to
9 the trial and that's why you have limits and Rule 26
10 limitations, so we'll likely not let in any of that
11 information.

12 Mr. Buckley?

13 MR. BUCKLEY: Your Honor, can I have two points of
14 clarification?

15 On the foundation objection, can I just have a
16 standing objection to that so that I don't have to do it on an
17 issue-by-issue basis? There may be some where it's broader
18 than that and I need to do something on the spot.

19 THE COURT: Foundation based on?

20 MR. BUCKLEY: The authenticity for documents that are
21 going to be implicated later if they aren't, and she's
22 testified about that.

23 THE COURT: Absolutely. And I won't -- I won't
24 formally admit the exhibits until we've had an opportunity to
25 discuss that, whether they have or have not been authenticated.

1 MR. BUCKLEY: And the second issue, Your Honor, we're
2 clearly going to get into that, and we're going to want
3 limiting instruction on the hearsay issues that they're not
4 being offered for the truth. I don't believe they are, but as
5 soon as they start to come in and there's an expert talking
6 about them, I think the jury ought to hear that.

7 THE COURT: All right. Do you have any objection to
8 that from BMG's side of things? It's what I talked about doing
9 from the very start. The evidence of the infringement is not
10 going to be the notice itself. It's going to be the
11 Rightscorp's software system identifying what -- you know, the
12 hits that are received based on its code. Right?

13 MR. CARACAPPA: That's correct. She's going to talk
14 about the software. She's going to say this is what it does,
15 this is how it works, and then it spits out a notice.

16 THE COURT: So it's an accusation?

17 MR. CARACAPPA: Exactly.

18 THE COURT: Okay. All right. Then I'll give that
19 limiting instruction that it's an accusation only and that it's
20 not -- that portion of it is not offered for the truth of
21 the -- whether or not there was an infringement.

22 MR. CARACAPPA: Yeah. I mean, the notices themselves
23 are -- they're evidence of actual notice and we think -- we
24 think the software works and it is an accurate identification
25 of infringement.

1 THE COURT: Yes, it accurately identifies, you know,
2 infringements -- well, the jury doesn't know whether -- the
3 jury is going to have to make the decision as to whether it
4 accurately identifies infringements. Clearly that's a center
5 foundation of the case. For now, you're going to admit the
6 notices for -- for what purpose, to demonstrate that that
7 software system that Rightscorp used was able to identify what
8 it believed were infringing downloads by using the BitTorrent
9 system by Cox customers?

10 MR. CARACAPPA: That's right, Your Honor. So the
11 software goes out and it identifies an IP address and a song
12 and a port and the fact that it's a Cox customer. And if the
13 jury --

14 THE COURT: She's going to testify to that?

15 MR. CARACAPPA: Yes. And if the jury believes that
16 the code works, then those 1.8 million notices are accurate
17 records of infringement. And if it doesn't, they may say,
18 well, only 1.7 of them or 1.6 or 1.5 or none of them are
19 accurate evidence of infringement.

20 THE COURT: So you do want to use the notices and the
21 information in the notices as proof of infringement?

22 MR. CARACAPPA: The notices are a manifestation of
23 the system. So we're not taking the notice itself and saying,
24 here, it's accurate evidence of infringement.

25 THE COURT: Right.

1 MR. CARACAPPA: But we have the code in conjunction
2 with the notice. So it's the entire system that when looked at
3 in its entirety is accurate and accurately identified
4 infringement we think 1.8 million times. Cox thinks it's some
5 number less than that. And we think the jury should be able to
6 at least see that there was that number of notices and say,
7 okay, I think the system works and that those notices are
8 accurate, or it's accurate 90 percent of the time or it's not
9 accurate at all.

10 THE COURT: Well, certainly is accurate for the fact
11 that there has been an accusation made in the notice of
12 infringement that's been sent by Rightscorp to Cox, but it's
13 actually the software system itself and whether the jury
14 believes that it accurately has captured those infringements,
15 which is the evidence of whether, in fact, there has been an
16 infringement, and the jury will decide that. So, do -- that's
17 the distinction I'm drawing. So tell me where you think I'm
18 wrong.

19 Mr. Allan, go ahead.

20 MR. CARACAPPA: I'm not understanding, Your Honor.

21 MR. ALLAN: I think the issue, Your Honor, is that
22 the notice is obviously part of a larger, right, piece of
23 evidence. Right? It's not -- standing alone, we can see. If
24 we come in and we just give that one piece of paper that that's
25 not going to do it. Okay?

1 THE COURT: Correct.

2 MR. ALLAN: We've got -- we've got copies of songs,
3 we've got the Dashboard, we've got roll-up notices, we've got
4 testimony from witnesses, we've got the source code discussion.
5 I think if you give a limiting instruction with respect to the
6 notices themselves, it's going to confuse the jury and they're
7 not going to look at all of the evidence in totality, which is
8 what you -- you've suggested or ordered that they need to do,
9 which is what they need to do.

10 So I don't think there's a need for a limiting
11 instruction. We're not going to stand up and say, this piece
12 of paper proves it's infringement. It's the total. It's the
13 sum total.

14 THE COURT: So --

15 MR. ALLAN: I think if you want to have an
16 instruction to us -- and we'll certainly abide by it -- that
17 says you can't make that argument to the jury, that this piece
18 of paper alone is enough, I think that solves the issue. I
19 don't think the jury needs to have a separate potentially
20 misleading instruction, given all the evidence that's going to
21 come in on this.

22 MR. BUCKLEY: Yeah.

23 THE COURT: Well, maybe Mr. Caracappa, what questions
24 are you going to ask this witness about, what she has done with
25 the notice that was generated by Rightscorp?

1 MR. CARACAPPA: Well, let me take it a step back.
2 Let me tell you what she's going to start with. She's going to
3 analyze all the source code that Rightscorp has going, and
4 she's going to talk about how the Rightscorp system works.
5 It's going to go through step by step about how the Rightscorp
6 system in -- just to torrent and then compares that torrent to
7 the BMG work, and then the lines of code that are used to see
8 whether or not there's a file on a peer, and how it extracts
9 that information.

10 Then she's going to talk about how in many instances
11 the Rightscorp software goes out and downloads an actual copy
12 in over 150,000 instances. And then she's going to talk about
13 the document that is spit out by that source code is this
14 notice. And then she's going to talk about how that notice is
15 sent to Cox and she looked at the CATS system at Cox and she
16 knows based on her analysis of the code exactly what's done
17 with that notice, with that information.

18 THE COURT: Okay. Now Mr. Buckley, why isn't that
19 permissible testimony without giving a limiting instruction
20 because ultimately -- go ahead. Tell me.

21 MR. BUCKLEY: So this is a very -- this is a very
22 specific hearsay issue, and it's a simple one. The evidence of
23 infringement, if there is any -- and that's just what
24 Mr. Caracappa and Mr. Allan have been saying. The evidence, if
25 there is any, is the Rightscorp system, it's the infractions

1 tables that are created with the data that's collected. These
2 notices say, here's what that evidence is. That is hearsay.
3 The notice itself is not proof of what the notice talks about.
4 Your Honor already ruled that.

5 So all we're asking for -- and this is what Rule 105
6 says -- is if they're going to wave the notices around, which
7 they've already been doing, and they said in their opening the
8 DMCA is shorthand for infringement. They've already had their
9 expert on the stand referring to infringements, which she
10 shouldn't be doing. Those are legal conclusions. If they're
11 going to use them in that way, we're entitled to an instruction
12 under Rule 105 that says the notice itself isn't evidence of
13 anything. It's not proof of an infringement. If they want to
14 go and prove that up, they should do that.

15 THE COURT: Well, they certainly are relevant in
16 their totality to the decision a jury will be making, and they
17 should come in in their complete form so the jury understands
18 what the Rightscorp system does. And at the end of her
19 testimony, she -- well, in her direct she clearly is going to
20 testify that the system works and is accurate, and as a result
21 her opinion is, as she's already given, that these copyrighted
22 materials were all downloaded through the Cox system and are
23 infringing.

24 MR. BUCKLEY: Your Honor, she shouldn't be able to
25 say that. She can talk about facts. She can talk about what

1 the system does and the results of it. She should not be able
2 to sit up here and tell the jury that's infringement. She's
3 not a lawyer. That's your job. So she shouldn't be able to
4 say that.

5 THE COURT: Well, that's a word of art that the jury
6 has been -- already been -- had spoken of and it's not --
7 certainly not -- I mean, infringement is the issue they're
8 going to have to ultimately decide. But that's why you have
9 experts to guide them through the use of what they're -- you
10 know, what they should be looking at to make that determination
11 and --

12 MR. BUCKLEY: Your Honor --

13 THE COURT: Does she know whether it's infringing or
14 not?

15 MR. BUCKLEY: No.

16 THE COURT: I mean, does she know whether there
17 are -- did she discuss -- has she covered all the licensing
18 issues and is she aware, or has she just been told they've been
19 downloaded without permission?

20 MR. BUCKLEY: She assumes that making available is
21 infringement, and that's the -- that's the assumption that her
22 opinions are based on. So in the same way, Your Honor, if one
23 of our experts got up and said, my opinion is Cox has not -- is
24 not contributorily liable for infringement --

25 THE COURT: All right.

1 MR. BUCKLEY: -- Mr. Allan would go through the roof
2 and you would sustain his objection. It's the same thing. She
3 shouldn't be here telling the jury what you are tasked with
4 finding has already occurred. That's one issue.

5 But there's still a separate issue of the notices.
6 They are hearsay. If they're offered for the truth, they can't
7 be.

8 THE COURT: Well, that's why I asked about them
9 yesterday or whenever the heck that was. And the answer was,
10 we want to use the exhibits, too, Judge, and I thought that
11 ended the issue.

12 MR. BUCKLEY: We all have to talk about the issues.
13 We all have to talk about the notices. But if they're just --
14 as Mr. Kelley said, I'm going to stack them to the ceiling and
15 say, there are the infringements in boxes over there, that's
16 clearly improper.

17 THE COURT: Well --

18 MR. ALLAN: Your Honor --

19 THE COURT: -- the answer yesterday should have been,
20 I still object on the basis of hearsay. We want to use the
21 document too, then it would have, in my mind, preserved the
22 issue. So what we're talking about tonight is a surprise given
23 what I understood you to say --

24 MR. BUCKLEY: Your Honor --

25 THE COURT: -- yesterday.

1 MR. BUCKLEY: -- I apologize for cutting you off.

2 I certainly never meant to waive that argument, and
3 I'm happy to go back and look at the transcript. This has all
4 been in the -- the only reason we're talking about the notices
5 was our motion in limine that they're hearsay. That's been
6 the -- that's been the wrapper for this whole conversation, and
7 that's what Rule 105 is about.

8 THE COURT: Maybe it's my fault.

9 MR. BUCKLEY: No, it's probably mine.

10 THE COURT: I asked yesterday --

11 MR. BUCKLEY: But that's what --

12 THE COURT: -- and Mr. Kelley --

13 THE REPORTER: One at a time.

14 THE COURT: Yeah, one at a time.

15 MR. BUCKLEY: Sorry.

16 THE COURT: I had Mr. Kelley up and I said, hey,
17 we -- you were going to file a brief if necessary. Where are
18 we? He ducked it, you know, like a curve ball from an all-star
19 claiming an illness and, you know, at the end of day then you
20 got up and I thought it resolved it. So that -- maybe I should
21 have kept asking questions.

22 Are they business records? Do they come in as
23 business records? There were several other -- there were
24 several objections to your motion in limine raised, and we
25 never -- I never resolved them because I never had enough

1 information, so here we go.

2 Put it in a -- in a pleading tonight; give it to me
3 in the morning. And both of you supplement your motion in
4 limine that you've filed already and tell me why the document
5 is independently admissible as a business record, if you
6 believe that it is; and if not, how it should be used.

7 If -- if we have not proven infringement yet, that's
8 a jury decision, then I believe Mr. Buckley is correct. The
9 testimony of Ms. Frederiksen-Cross should be limited to her
10 talking about the accuracy of the system and the information it
11 generates and not going to the ultimate question of
12 infringement. That's not her job. She doesn't have firsthand
13 information. She's not a lawyer. It's a -- as Mr. Buckley
14 pointed out, it's an issue that the jury should decide that I
15 rarely ever give to an expert to make an ultimate
16 determination, and I did not mean by my questioning tonight to
17 suggest it should be. I was merely asking about how far you
18 intended to go.

19 So there's two issues. One is is it hearsay, should
20 we have a limiting instruction. Is it independently -- are
21 they all independently admissible. But at the end of the day
22 this is -- Ms. Frederiksen-Cross is not going to be testifying
23 about whether they're infringement or not. It's just about
24 whether the information in the notices is accurate based on her
25 investigation.

1 Okay?

2 MR. BUCKLEY: Thank you, Your Honor.

3 THE COURT: Does that work?

4 MR. WAKEFIELD: (Nods head.)

5 MR. ALLAN: Your Honor, yes. Two, I think, small
6 housekeeping matters on something else.

7 Your Honor asked to have the depositions -- the
8 transcripts that were in dispute. I actually -- I think there
9 are other people on teams that aren't with us right now that
10 are coordinating on this, so I'm not sure we exactly know
11 what's in this binder, but there are some transcripts for you.

12 And I've looked through it and I'm happy to share it
13 with counsel here. This is what I have. And I note that what
14 you're going to get doesn't seem to be all that user-friendly,
15 and we'll certainly do our best to make it more user-friendly
16 the next time you see it.

17 THE COURT: And I'm old-school, and I've spent a fair
18 amount of time outside the courtroom doing whatever other
19 people in this case are doing. And it was drilled into me that
20 the way the judge wanted it was he wanted the deposition in its
21 totality so that he could see who the witness was, what they
22 were testifying about, and get a sense of why they were
23 testifying.

24 And then, you know, page 103, plaintiff wants, you
25 know, the deposition testimony either read in or by video of

1 pages 103 through 108. Cox wants counters 108 to 116 or 160 to
2 172. The objections were embedded in the deposition transcript
3 itself, which depending on what jurisdiction you're trying the
4 case in may or may not be permissible anymore, frankly. I know
5 I went to Texas and learned a real lesson on how they
6 interpreted the rules.

7 But tell me what you've got now.

8 MR. ALLAN: I know we have a folder for you, Your
9 Honor. Mr. Theodore will handle this exhibit.

10 MR. THEODORE: So where we have -- we have three full
11 transcripts, Your Honor, that have -- on them they have
12 highlighting. I believe the yellow is our initial
13 designations, the green is their -- is Cox's counter
14 designations, and the pink is our fairness designations. So
15 the three transcripts are Sikes, Carothers 1, and Carothers 2.

16 THE COURT: Okay. And are the objections embedded
17 in --

18 MR. THEODORE: Well, there are -- some objection -- I
19 mean, people object differently in the transcripts. So you
20 have the full transcript, so you'll see the objections.

21 We also have two additional documents for you that
22 are designed to tell you the objections that people are
23 standing on currently after our meet and confer.

24 So first of all, we have a chart which has the
25 objection -- objection codes, and then we have a chart that has

1 the page and line numbers of each designations. And then if
2 those objections -- or those page and line numbers are objected
3 to, we have the designations that the parties are standing on
4 in the chart.

5 THE COURT: Okay. I should be able to figure that
6 out.

7 MR. THEODORE: Yeah. And now that I look at it,
8 maybe the chart probably should be in bigger font, and we will
9 make the chart in bigger -- try to make a chart in bigger font
10 next time.

11 THE COURT: Okay. Are you going to call -- you
12 expect to use these tomorrow?

13 MR. THEODORE: Maybe tomorrow or maybe Friday. You
14 know, if -- they are -- they have been noticed for tomorrow.
15 We'll see how long the witnesses take.

16 THE COURT: Okay. All right. Then I'll do the best
17 I can to get -- to get through those.

18 MR. ALLAN: And, Your Honor, just one more small
19 thing on the -- the one exhibit we introduced with Mr. Hubert,
20 I have several copies here which signals to me that I perhaps
21 neglected to pass up the appropriate numbers.

22 THE COURT: That was 248?

23 MR. ALLAN: Let me double-check.

24 THE COURT: 248 made its way.

25 MR. ALLAN: PXS 001. No, I don't believe.

1 THE COURT: Oh.

2 MR. ALLAN: I know I gave you one for the witness,
3 but I may have given you three.

4 THE COURT: Okay.

5 MR. BRIDGES: May I ask, what -- today probably ran
6 longer than we expected and we're probably running behind. May
7 I ask who you're going to be put on tomorrow?

8 MR. ALLAN: Well --

9 MR. BRIDGES: Designated people, but we're running
10 behind. I would like to know if there's somebody you know who
11 you're going to anticipate getting on tomorrow.

12 MR. ALLAN: Well, I believe the next live witness is
13 Mr. Hauprich.

14 MR. BRIDGES: You're going to do him before the
15 video?

16 MR. ALLAN: I don't know that we know the answer to
17 that right now.

18 THE COURT: Okay. Well, keep working and
19 communicating. And I appreciate the work you did today. And
20 I'll see you-all at 9 o'clock tomorrow morning.

21 All right? Thank you.

22 I'm sorry?

23 MR. THEODORE: May I hand this to your bailiff?

24 THE COURT: Yes, please.

25 MR. WARIN: Your Honor, did you mean 8:50?

1 THE COURT: Yes. If you can't work it out, then I'll
2 be here in chambers and we'll get rolling at 8:50. All right.
3 Thank you, Mr. Warin.

4 All right. Thank you. We're in recess.

5 VOICES: Thank you, Your Honor.

6 NOTE: The December 2, 2015 portion of the case is
7 concluded.

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17 We certify that the foregoing is a true and
18 accurate transcription of our stenographic notes.
19
20

21 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

22 /s/ Julie A. Goodwin
23 Julie A Goodwin, CSR, RPR
24
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